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SHORT TITLE: [Bailey, Clark A.]
VERSUS [Noot, Arthur E., et al.] DATE DOCKETED: [010992]

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1	Jan 9 1992	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Feb 7 1992		Brief of respondents Arthur E. Noot, et al. (PRINTED) in opposition filed.
4	Feb 13 1992		DISTRIBUTED. February 28, 1992
5	Feb 24 1992	X	Reply brief of petitioner Clark Albert Bailey (PRINTED BRIEF) filed.
7	Mar 2 1992		REDISTRIBUTED. March 6, 1992
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11	Mar 23 1992		Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.)

****

91-7002 (2)

No. _____

ORIGINAL

In the
Supreme Court of the United States
October Term, 1991

CLARK ALBERT BAILEY,
Petitioner,

v.

ARTHUR E. NOOT, ORVILLE PUNG, CHARLES G. SHEPPARD, LESLIE R. GREEN, WILLIAM F. McCRAE, BRUCE M. BELTT, RICHARD A. ALSTAD, JAMES BRUTON, HENRY GREENCROW, and DOROTHY SKWIERA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the retroactive application of a state regulation, having by statute the force and effect of law, which repeals a previously existing right to be considered annually for parole such that an affected prisoner no longer has any opportunity to be considered for parole, violate the Ex Post Facto Law Clause of the United States Constitution?

2. Does a person civilly committed to a security hospital as dangerous possess a constitutional right under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to such minimally adequate treatment as will give the person a reasonable opportunity to end the commitment?

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No. _____

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Clark Albert Bailey ("Bailey") asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is published at 940 F.2d 1150 (8th Cir. 1991), and is reproduced in the Appendix beginning at page A-1. The opinion of the District Court is unpublished. Excerpts appear in the Appendix beginning at page A-20.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on July 26, 1991. A timely petition for rehearing, with three judges dissenting, was denied on October 11, 1991. (A-18.) This petition for a writ of certiorari was filed within 90 days of the denial of the petition for rehearing. This Court has juridiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition involves the Ex Post Facto Law Clause of the United States Constitution, Article 1, § 9, Clause 3, which states:

> No Bill of Attainder or ex post facto law shall be passed.

This Petition also involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law;
> . . . .

STATEMENT OF THE CASE

In December 1976, Bailey was charged with various criminal offenses in Minnesota state court. In May 1977, he pled guilty to the charges and was sentenced to various terms of imprisonment, all to be served concurrently.

Execution of Bailey's sentence was stayed, however, pending an examination to determine whether he was in need of psychiatric treatment. Such an examination was made, and in July 1977 Bailey was civilly committed to the Minnesota Security hospital "for care, treatment, and custody . . . ."

Approximately two years later, the Minnesota Department of Human Services ("DHS"), which has jurisdiction over the Security Hospital, ordered Bailey transferred to the Minnesota Department of Corrections ("DOC") to serve his prison sentence. He remains under civil commitment and thus will be subject to the custody of DHS upon finishing his prison sentence.

Bailey commenced this action, *pro se*, in December 1982 against various DHS[1] and DOC[2] officials and employees (hereafter collectively "the State"). His Second Amended Complaint[3] asserted five causes of action. Jurisdiction in the District Court was based upon 28 U.S.C. § 1331 and § 1343(a).

Two of Bailey's claims are the subject of this Petition for a Writ of Certiorari. The first is Bailey's claim that the State is violating his rights under the ex post facto clause, U.S. Const., Art. I, § 9, clause 3, by retroactively applying a state regulation which precludes Bailey from being annually considered for parole. The statute and regulations in effect at the time of Bailey's crimes required that

[1] Respondents Noot, Sheppard, and Beltt.

[2] Respondents Pung, Green, McRae, Alstad, Bruton, Greencrow and Skwiera.

[3] Counsel of Record in this Court was appointed to represent Bailey by the District Court in 1984. The Eighth Circuit continued that court-appointment for purposes of appeal.

prisoners receive annual reviews at which they could be considered for a change in their release date (parole). Application of the new regulation to Bailey denies him that previously existing opportunity for parole and means that he now must serve his sentence to expiration.

The second claim is that the State is violating Bailey's rights under the due process clause of the fourteenth amendment by failing to provide him with such minimally adequate treatment as will give him a reasonable opportunity to end his civil commitment to the Minnesota Security Hospital. The State's failure to provide such treatment to Bailey means that his civil commitment is in effect a life sentence. Once Bailey completes his prison sentence, he will be returned to the Security Hospital where he may spend the rest of his life unless the State is required to provide minimally adequate treatment.

A. *Bailey's Ex Post Facto Law Claim.*

Under Minnesota law as it existed at the time of Bailey's crimes, the Minnesota Corrections Board ("MCB") functioned as the State's parole agency. *See* Minn. Stat. § 243.05 (1971) (repealed). (A-28.) Pursuant to both its governing statute and its own regulations, the MCB has the authority to set release dates and to grant, deny, or revoke parole. *See id.* §§243.05-243.12 (1971); Minnesota Corrections Bd.: Adult and Youthful Offender Parole Policies and Procedures (July 1977) (hereafter "Policies & Procedures"). Each inmate was entitled to an annual review of his case by the MCB, and one purpose of this annual review was to decide whether his release date should be revised. *See* Policies & Procedures §§7-101-.15-16, 7-101.19(a), 7-104.4(b). (A-30-31.)

Consistent with its regulations, the MCB met the first two years Bailey was under its control, assigned an initial release date of the expiration of his sentence and later conducted an annual review. Effective June 30, 1982, the MCB went out of existence. Prior to disbanding, the MCB met and reviewed all cases in which an inmate had been assigned a release date of the expiration of their sentence.

Bailey's case was among those reviewed. The MCB decided to continue Bailey's release date as the expiration of this sentence.

After abolition of the MCB, authority to grant parole was transferred to the commissioner of corrections. *See* Minn. Stat. § 243.05, subd. 1 (1989). (A-28.) The commissioner was authorized to "adopt rules in accordance with Chapter 14, The Administrative Procedure Act, governing the procedures for granting of conditional release and final discharge." Minn. Stat. § 243.05, subd. 2 (1989). (A-28-29.)

The commissioner exercised this authority and promulgated new regulations establishing an Office of Adult Release ("OAR"). *See* 3 Minn. Rules §§ 2940.0200-2940.0400. The particular regulation whose application to Bailey is at issue in this case addresses "[i]ncarcerated inmates with indeterminate sentences governing their release dates which were established prior to July 1, 1982." *Id.* § 2940.1500, subp. 2. (A-29.) For those prisoners the regulation provides: "[a]ll release dates established by the [MCB] will be left in full force and effect by the commissioner." *Id.* § 2940.1500, subp. 2(A). (A-29.) In other words, the commissioner and his delegatee, the OAR, are now legally forbidden to revise the parole dates of inmates in Bailey's position. A narrow exception to this prohibition is allowed to "correct[] mathematical, data entry, or computational errors" and to reflect system-wide policy changes. *Id.* § 2940.1550, subp. 2(B). (A-29.) But the commissioner and the OAR are now without legal authority to alter the release dates of inmates like Bailey based upon individualized, annual consideration of the circumstances of each case.

Under the statutes and regulations in effect at the time of his offense, Bailey could have been paroled at any time. He was entitled to an annual review at which his release date could be altered. Under the statute and regulations enacted after his offense, Bailey is ineligible for parole. *See* 3 Minn. Rules § 2940.1500, subp. 2(B). (A-29.)

Without question, these new regulations are being

retroactively applied to Bailey. Since 1981 Bailey has received no further review or consideration for parole. The results of his annual review no longer may result in consideration of a change in his release date. Since 1982, Bailey has sent letters to various State officials including the OAR requesting that his case be reviewed for the purpose of considering a change in his release date or parole. In each instance Bailey has been told that the new regulations preclude any such review. (*See* A-22.) The State itself, in the deposition testimony of its agents, the opinion letter of an assistant attorney general, and correspondence with Bailey, has consistently asserted that the new regulations have the force and effect of law and preclude any consideration for a change in release date or parole. As the State recognizes, the retroactive application of these regulations disadvantage Bailey because they make consideration for parole or a change in his release date impossible or more difficult than under the system in effect at the time of Bailey's crimes. Bailey must now serve his entire term of imprisonment without the opportunity for parole or an early release that previously existed.

B. *Bailey's Right To Treatment Claim.*

Before execution of his prison sentence, Bailey was examined to determine if he should be civilly committed. The State court found that Bailey was not mentally ill or deficient, but that he did exhibit "emotional instability, impulsiveness of behavior, and lack of customary standards of good judgment . . . ." The court therefore committed Bailey to the Minnesota Security Hospital "for care, *treatment*, and custody . . . ." (emphasis added).

Athough the director of the Security Hospital understood that persons committed to his care were to receive treatment, and that Bailey was in need of treatment, the director soon decided after Bailey arrived that he wanted to get rid of Bailey and would not provide treatment. Indeed, the director's sworn deposition testimony is

surprisingly frank in this regard:

> Q. Did you want to provide treatment to Mr. Bailey, Doctor?
>
> A. Basically, no.

Bailey requested treatment while at the Security Hospital. Consistent with the director's expressed intent, however, Bailey was never provided with treatment. Instead, Bailey was simply incarcerated.

Because he had not received treatment, Bailey brought a complaint before the Security Hospital Review Board. After hearing evidence from both sides, the Review Board found "that Mr. Bailey, since his commitment to the Minnesota State Security Hospital, has been wholly deprived of treatment of any kind, including medication. The Board finds, in addition, that Mr. Bailey does not have a treatment plan; nor does he have a 'one-to-one'."

Although the Review Board ordered treatment, the Security Hospital instead commenced administative proceedings to have Bailey transferred to DOC to begin serving his prison sentence. Eventually, DHS succeeded. However, Bailey's civil commitment remains. Upon completion of his prison sentence, Bailey will be returned to the Security Hospital. He can only be discharged from his civil commitment if a special review board determines that he no longer is dangerous to others. *See* Minn. Stat. § 253A.15 (1979). Without minimally adequate treatment as will give him a reasonable opportunity to end the commitment, however, Bailey's civil commitment is in effect a life sentence.

C. *The Lower Courts' Decisions.*

Following discovery, Bailey moved for summary judgment against the State on his ex post facto law claim. The State also moved for summary judgment on the same claim, and on all of Bailey's other claims including his right to treatment claim. A magistrate issued two reports and recommendations recommending that the State's motions be granted. Bailey appealed to the district court

for *de novo* review.

The District Court basically adopted the magistrate's reports. On the ex post facto law claim, however, the District Court held that because state law precludes the retroactive application of a regulation which has the effect of postponing eligibility for parole, *see* Minn. Stat. § 243.05, subd. 1(d) (1989), the new regulation being retroactively applied to Bailey could not be a "law" for purposes of the ex post facto clause because such retroactive application would exceed the rulemaking authority granted the commissioner of corrections. (*See* A-22-27.) On Bailey's right to treatment claim, the District Court held that Bailey had not come forward with sufficient factual evidence that the State had not provided him with minimally adequate treatment to avoid summary judgment.

Bailey appealed the District Court's decision to the Eighth Circuit. The panel that heard his appeal issued a splintered decision affirming the District Court's dismissal of Bailey's ex post facto law claim. *See Bailey v. Noot*, 940 F.2d 1150 (8th Cir. 1991) (reproduced in the Appendix beginning at page A-1.)

One judge ruled that the new regulation in issue was not a "law" for purposes of the ex post facto clause because the commissioner of corrections retains the power to amend or change the regulations in accordance with the state administrative procedures act. The judge also compared the State's new regulation to the federal parole commission's discretionary guidelines. *See id.* at 1155.57

The second panel judge concurred only in the result on Bailey's ex post facto law claim. He did not explain his reasoning however. *See id.* at 1157.

Chief Judge Lay dissented from the panel majority's decision on Bailey's ex post facto law claim and would have reversed the District Court on that issue. Chief Judge Lay pointed out that the federal parole guideline cases are inapposite. Unlike the regulation in Bailey's case, the federal parole commission has discretion to ignore its own guidelines. In contrast, the OAR in Bailey's

case is bound by the new regulation and has no discretion to ignore it. *Id.* at 1158-59. In addition, the fact that the commissioner can always amend the regulation does not mean the regulation is not a law. "The ex post facto clause would have little effect if the legislature could accomplish through administrative action what it is prohibited from doing through legislation." *Id.* at 1159 (Lay, C.J., dissenting).

On Bailey's right to treatment claim, the panel was unanimous in affirming the District Court. The Eighth Circuit's reasoning, however, was that "Bailey, as a dangerous psychopath civilly committed for the purpose of safekeeping, simply does not have the constitutional right he claims" to minimally adequate treatment. *Id.* at 1154.

Bailey filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The Eighth Circuit denied the petition, although three judges voted to rehear Bailey's ex post facto law claim *en banc*. (A-18-19.)

ARGUMENT FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION TO REVIEW BAILEY'S EX POST FACTO LAW CLAIM.

The ex post facto clause "forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." *Lindsey v. Washington,* 301 U.S. 397, 401 (1937). Three elements must be present in order to violate the ex post facto clause: (1) the statute, rule, regulation or other action challenged must be a "law" for purposes of the clause; (2) the law must have been applied retroactively; and (3) the retroactive application of the law must have disadvantaged the individual affected by it. *Weaver v. Graham,* 450 U.S. 24, 29 (1981).

The existence of the second element -- retroactive application -- is conceded by the State. The State is applying to Bailey regulations that came into existence after the date of his offense. *See id.* at 31.

The Eighth Circuit's minority opinion that the new regulation being applied to Bailey is not a "law" for purposes of the ex post facto clause is demonstrably wrong. The new regulation does have the force and effect of law. The new regulation was adopted pursuant to authority delegated by the legislature. *See* Minn. Stat. § 243.05, subd. 2 (1989). (A-28.) By statute, the new regulations "have the force and effect of law . . . ." Minn. Stat § 14.38, subd. 1. (A-28.) As "a legislative rule promulgated pursuant to statutory authority," the regulation "is valid and is as binding upon a court as a statute." *State v. Hopf,* 323 N.W.2d 746, 752 (Minn. 1982) (citations omitted). More importantly, the new parole regulations are also binding upon the commissioner and his delegatee, the OAR. "Even though the adopting of the rule was a discretionary function, once the rule is in force the adopting agency does not have discretion to disregard it." *State ex rel. Indep. Sch. Dist. No. 6 v. Johnson,* 242 Minn. 539, 548, 65 N.W.2d

668, 673 (1954).

The cases interpreting the federal parole guidelines relied upon by the Eighth Circuit are inapposite. Those guidelines do not represent "the exercise of delegated authority" but are instead " 'merely guides, and not laws: guides may be discarded where circumstances require; laws may not.' " *Prater v. U.S.P.C.,* 802 F.2d 948, 954 (7th Cir. 1986) (en banc) (quoting *Inglese v. U.S.P.C.,* 768 F.2d 932, 936 (7th Cir. 1985) Almost every case addressing the validity of retroactive application of the federal parole guidelines has turned on the fact that the guidelines do not bind the U.S. Parole Commission. Time and again, courts stressed that the U.S. Parole Commission was free to depart from its own guidelines. That is not the case here. Bailey's release date "shall be left in full force and effect" by the OAR. 3 Minn. Rules § 2940.1500, subp. 2(a). (A-29.)

Moreover, the fact that the commissioner of corrections retains authority to revise the regulations does not render them outside the scope of the ex post facto clause. A legislature cannot avoid the ex post facto clause by delegating rulemaking authority to an agency. "When [a legislature] has delegated to an agency the authority to make a rule it is an extension of the statute for purposes of the [ex post facto] clause. What [a legislature] cannot do directly, it cannot do by delegation." *Rodridguez v. U.S.P.C.,* 594 F.2d 170, 173 (7th Cir. 1979). Clearly, if the Minnesota legislature had adopted a statute taking away Bailey's pre-existing right to be reviewed annally for parole, such a statute would be deemed a "law" for purposes of the ex post facto clause. It is the discretion retained by the agency under its own regulations that is determinative, not the discretion granted by the governing statute. *See generally Prater v. U.S.P.C.,* 802 F.2d 951-54. Here, the OAR has no discretion to ignore 3 Minn. Rules § 2940.1500, subp. 2(A). By statute it has the force and effect of law and may not be ignored. *See* Minn. Stat. § 14.38, subd. 1. (A-28.)

The final element necessary for finding a violation of

the ex post facto clause also is present in this case. Bailey no longer has any right to be considered annually for parole. Indeed, the District Court conceded that "the current OAR regulations are less favorable than the former MCB guidelines."

This Court has warned that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present a serious question under the *ex post facto* clause . . . ." *Warden v. Marrero,* 417 U.S. 653, 663 (1974) (emphasis in original). This Court has stated that "'depriving a prisoner of the right . . . to qualify for, and hence earn, parole'" is a detriment to which the ex post facto clause is addressed. *Weaver v. Graham,* 450 U.S. at 34 (quoting *Greenfield v. Scafati,* 277 F. Supp. 644, 646 (D. Mass. 1967), *aff'd mem.,* 390 U.S. 713 (1968)). *See Warden v. Marrero,* 417 U.S. at 662 ("only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole").

This Court has previously held that retroactively depriving an inmate of the *opportunity* to shorten his confinement -- precisely what has happened to Bailey --violates the ex post facto clause. The changes at issue in *Weaver v. Graham* were struck down because they "reduced [the inmate's] *opportunity* to shorten his time in prison." 450 U.S. at 33-34 (emphasis added). The changes at issue in *Lindsey v. Washington* were struck down because they deprive the offender of "all *opportunity* to receive a [less onerous] sentence." 301 U.S. at 402 (emphasis added). The fact that Bailey might not be given parole or an early release date even under the old guidelines does not matter. *See Miller v. Florida,* 482 U.S. 423 (1987); *Lindsey v. Washington,* 301 U.S. at 401-02. In retroactively applying the new regulation to Bailey, the State has "'expressly remove[d] all hope of parole'" and thus there is no question that its action "'is in the nature of an additional penalty'" prohibited by the ex post facto clause. *Warden v. Marrero,* 417 U.S. at 663 (quoting *Durant v. United States,* 410 F.2d 689, 691 (1st Cir. 1969)).

A. *This Claim Raises Important Issues Of Constitutional Law Unresolved By This Court.*

This Petition raises the important issue of whether the ex post facto clause applies to a change in parole eligibility. This Court has never directly held that parole eligibility is part of a prisoner's sentence subject to the prohibitions of the ex post facto clause. In *dicta,* the Court has commented that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present a serious question under the *ex post facto* clause . . . ." *Warden v. Marrero,* 417 U.S. at 663 (emphasis in original). Various circuit courts have addressed the issue and indicated, contrary to the Eighth Circuit, that parole eligibility is subject to the ex post facto clause. *See, e.g., Fender v. Thompson,* 883 F.2d 303, 306 (4th Cir. 1989); *United States ex rel. Graham v. U.S.P.C.,* 629 F.2d 1040, 1043 (5th Cir. 1980); *Shepard v. Taylor,* 556 F.2d 648, 654 (2d Cir. 1977). But this important issue has never been resolved by this Court.

In addition, this Petition presents the important constitutional law issue of the appropriate method of analysis for deciding whether regulations have the force and effect of law. The Eighth Circuit looked to the discretion retained under the statute to change the regulation in issue. *See* 940 F.2d at 1156. Other circuits, however, have looked to the discretion retained under the regulations to ignore the regulations. *See, e.g., Prater v. U.S.P.C.,* 802 F.2d at 954; *Rifai v. U.S.P.C.,* 586 F.2d 695, 698 and n.5 (9th Cir. 1978). This question has never been addressed by this Court.

The importance of both these issues go beyond this case. They are recurring constitutional questions which are vital to application of the ex post facto clause in the context of regulations affecting parole eligibility. This Court should grant the Petition to address these important unresolved questions of constitutional law.

B. *The Eighth Circuit's Opinion Is Contrary To The Decisions Of This Court And Other Circuit Courts.*

As suggested by the previous analysis (*see supra* pages 10-12), the Eighth Circuit's decision is contrary to the rationale of a number of decisions of this Court interpreting and applying the ex post facto clause. Under any principled application of the ex post facto clause and this Court's decisions, the new regulation being retroactively applied to Bailey should be struck down. The Eighth Circuit also ignored controlling Minnesota law – both statutory and case law – which clearly provides that the new regulations being applied to Bailey have the force and effect of law and may not be disregarded by the OAR. This Court should grant the Petition to correct these egregarious errors.

Moreover, the Eighth Circuit's decision creates a split among the circuit courts on various issues. The Eighth Circuit's decision is directly contrary to the Eleventh Circuit's recent decision in *Akins v. Snow,* 922 F.2d 1558 (11th Cir.), *cert. denied,* 111 S. Ct. 2915 (1991).

In *Akins,* the plaintiffs challenged the retroactive application of new state regulations which had the effect of delaying their ability to be considered for parole as opposed to the regulations in effect at the time of their offenses. *Id.* at 1559-60. The Eleventh Circuit did not simply conclude that because the state agency in question could always change the regulations they were not "laws" for purposes of the ex post facto clause. Rather, the court pointed out that the state agency was acting as a delegatee of the state legislature and therefore any regulations promulgated by the state agency were subject to the ex post facto clause. *Id.* at 1561. The Eleventh Circuit went on to hold that because the new regulations delayed parole eligibility, they ran afoul of the ex post facto clause. *Id.* at 1562-63.

The Eighth Circuit's decision also creates a split among the circuit courts concerning the method of analysis for

analyzing asserted violations of the ex post facto clause by retroactively applied regulations. As indicated previously, most circuits have looked to the discretion retained under the regulations to decide if a new regulation was a "law" within the scope of the ex post fact clause. *See, e.g., Smith v. U.S.P.C.,* 875 F.2d 1361, 1367 (9th Cir. 1988); *Prater v. U.S.P.C.,* 802 F.2d at 953-54. The Eighth Circuit, however, looked to the discretion retained to amend the regulations. 940 F.2d at 1156. But every legislature has the power to change the law, that is the reason for the protection provided by the ex post facto clause.

Finally, to the extent the Eighth Circuit's opinion can be construed as deciding that changes in eligibility for parole do not violate the ex post facto clause, another split among the circuit courts is created. Every other circuit court that has addressed the issue has determined that the ex post facto clause applies to a change in a prisoner's eligibility for parole. *See, e.g., Akins v. Snow,* 922 F.2d at 1563; *Fender v. Thompson,* 883 F.2d at 306; *United States ex rel. Graham v. U.S.P.C.,* 629 F.2d at 1043; *Rodridguez v. U.S.P.C.,* 594 F.2d 170, 176 (7th Cir. 1979); *Breest v. Helgemoe,* 579 F.2d 95, 102 (1st Cir.), *cert denied,* 439 U.S. 933 (1978); *Shepard v. Taylor,* 556 F.2d at 654.

This Court should grant this Petition in order to resolve the splits among the circuit courts and to insure that this Court's decisions interpreting the ex post facto clause are properly and uniformly applied. These issues will continue to arise and will continue to confound litigants, attorneys' and the lower courts if Bailey's Petition is not granted.[4]

C. *The Eighth Circuit's Reasoning Effectively Reads The Ex Post Facto Law Clause Out Of Existence.*

As cogently expressed by Chief Judge Lay in his

[4] A clear illustration of the need for review by this Court is the fact that four different United States judges now have reviewed Bailey's ex post facto law claim and none have agreed on the reasoning to resolve the claim.

dissent, *see* 940 F.2d at 1158-59, the reasoning adopted by the Eighth Circuit effectively reads the ex post facto clause out of existence, "if the legislature [can] accomplish through administrative action what it is prohibited from doing through legislation. [I]t is imperative that binding administrative action be considered a legislative act for purposes of the ex post facto clause." *Id.* at 1159. If a state legislature -- or Congress -- can circumvent the ex post facto clause simply by delegating to an administrative body the power to do an act which the legislature could not do directly, then the intent of the Founding Fathers in placing the ex post facto clause in Article I of the Constitution can be easily frustrated. The ex post facto clause will effectively cease to exist, arising only when a legislature foolishly acts directly instead of delegating to a willing administrative agency.

Accordingly, this Court should grant Bailey's Petition for a Writ of Certiorari to review the decision of the Eighth Circuit on his ex post facto law claim. This Petition raises important, recurring, and unresolved issues of constitutional law. The Eighth Circuit's opinion is contrary to reasoning of other decisions of this Court, ignores applicable Minnesota state law, and creates a split among the circuit courts on several issues. Finally, the Eighth Circuit's opinion effectively reads the ex post facto clause out of existence. The extraordinary power of this Court to grant a writ of certiorari should be exercised in this action.

II. THIS COURT SHOULD GRANT THE PETITION TO REVIEW BAILEY'S RIGHT TO TREATMENT CLAIM.

In deciding Bailey's claim that he had been denied treatment by DHS, the Eighth Circuit simply held that Bailey, as a dangerous person civilly committed in part for safekeeping, "simply does not have the constitutional right he claims." 940 F.2d at 1154. This reasoning -- that a civilly committed person dangerous to others does not have a constitutional right to minimally adequate

treatment -- raises an important, unresolved issue of constitutional law. The Eighth Circuit's reasoning also is contrary to the decisions of several other circuits. This Court should therefore grant Bailey's Petition to review his denial of treatment claim.

A. *This Claim Raises An Important Issue Of Constitutional Law Unresolved By This Court.*

The issue presented by Bailey's denial of treatment claim is whether a person who is civilly committed as dangerous to others has a constitutional right under the due process clause of the fourteenth amendment to receive minimally adequate treatment such that the person has a reasonable opportunity to end the commitment. This Court has never directly addressed this important issue.

In *Youngberg v. Romeo,* 457 U.S. 307 (1982), this Court addressed the question of whether a civilly committed retarded person had a constitutional right to receive minimally adequate training to be free from unreasonable restraints. This Court held that such a constitutional right existed. *Id.* at 322.

In *Jackson v. Indiana,* 406 U.S. 715 (1972), this Court addressed the question of whether a person who was incompetent to stand trial could be indefinately committed. This Court held that such an indefinate commitment violated the fourteenth amendment's due process clause. *Id.* at 731, 736-39.

This case presents the conjunction of those two prior decisions of this Court. If a person such as Bailey does not have a constitutional right to receive minimally adequate treatment so as to have a reasonable opportunity to end the commitment -- as the Eighth Circuit held -- then his civil commitment is in effect a life sentence which bypasses the protections and procedures of the criminal justice system.

Moreover, this Court has recognized the substantial nature of this issue. In *Humphrey v. Cady,* 405 U.S. 504 (1972), the plaintiff was a convicted criminal committed to a state hospital facility for an indefinite time for

treatment. *Id.* at 506. The plaintiff brought suit contending, *inter alia,* that he has been deprived of treatment in violation of his due process rights. *Id.* at 514. In reversing the lower court's dismissal of his claim, this Court stated in passing that his allegations were "substantial constitutional claims." *Id.*

Bailey's denial of treatment claim raises an important, recurring question of constitutional law which has importance beyond simply this case. Many states are regularly pursuing civil commitment of dangerous persons in addition to criminal proceedings. If a civilly committed person has no constitutional right to minimally adequate treatment simply because the person is dangerous, then why even bother with criminal charges? Civil commitment will simply amount to a life sentence. Bailey was civilly committed, in part, to receive treatment. This Court should decide whether Bailey has a constitutional right to such treatment, or whether the State can effectively impose a life sentence on Bailey via the civil commitment procedure.

B. *The Eighth Circuit's Opinion Is Contrary To The Decision Of Other Circuit Courts.*

Rather than address the question of whether Bailey had presented sufficient evidence to avoid summary judgment (arguably because Bailey had presented evidence which created material fact issues), the Eighth Circuit simply held that Bailey did not have the constitutional right he claimed. But no other circuit court that has considered the right to minimally adequate treatment issue has reached that result. The Eighth Circuit's decision thereby creates a substantial split among the circuits which this Court should resolve.

A fourteenth amendment right to treatment for civilly committed individuals was first recognized in *Rouse v. Cameron,* 373 F.2d 451 (D.C. Cir. 1966). Since that time, numerous courts have held that involuntarily committed individuals, like Bailey, have a fourteenth amendment right to treatment. *See, e.g, Bowring v. Goodwin,* 551 F.2d

44 (4th Cir. 1977); *Wyatt v. Aderholt,* 503 F.2d 1305 (5th Cir. 1974). *See also* Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment,* 86 Harv. L. Rev. 1282 (1973). Indeed, treatment is the *quid pro quo* for committing a person who is dangerous to others. *Wyatt v. Aderholt,* 503 F.2d at 1312.

The fact that Bailey was deemed dangerous does not deny him this constitutional right. In *Eckerhart v. Hensley,* 475 F. Supp. 908, 914, 915 (W.D. Mo. 1979), the court rejected an argument similar to the conclusion of the Eighth Circuit and properly concluded "that due process requires that [persons] who have been involuntarily committed . . ., be provided with such treatment as will give each of them a reasonable opportunity to be cured or to improve his mental condition . . . . The fact that plaintiffs have been deemed dangerous does not deprive them of a constitutional right to treatment. . . ."

The Eighth Circuit's contrary reasoning creates a split between itself and at least the Fourth and Fifth Circuits which have recognized a fourteenth amendment due process right to minimally adequate treatment. This recurring issue should be resolved by this Court granting Bailey's Petition on his denial of treatment claim.

CONCLUSION

For the foregoing reasons, Petitioner Clark Albert Bailey prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit.

Dated: January 8, 1992

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United States Court of Appeals
For The Eighth Circuit

No. 89-5219

Clark A. Bailey,
Appellant,
v.
Sandra Gardebring, Commissioner of Human Services, and State of Minnesota,
Appellees.

Appeal from the United States District Court for the District of Minnesota.

No. 89-5403

Clark Albert Bailey,
Appellant,
v.
Arthur E. Noot, Orville Pung, Charles G. Sheppard, Leslie R. Green, William F. McCrae, Bruce M. Beltt, Richard A. Alstad, James Bruton, Henry Greencrow, and Dorothy Skwiera,
Appellees.

Appeal from the United States District Court for the District of Minnesota.

Submitted: May 14, 1990
Filed: July 26, 1991

Before LAY, Chief Judge, BOWMAN, Circuit Judge, and STUART,* District Judge.

*The HONORABLE WILLIAM C. STUART, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

BOWMAN, Circuit Judge.

In the latter part of 1976 Clark Albert Bailey kidnapped and sexually abused a thirteen-year-old girl in Minnesota and murdered her in Iowa. He pled guilty in Minnesota to criminal sexual conduct in the first degree and kidnapping and in Iowa to second degree murder. For these offenses he received sentences of twenty years, forty years, and forty years, respectively. All sentences are to be served concurrently.

After sentencing Bailey for this Minnesota offenses, the Hennepin County District Court stayed the sentences to allow the probate court to obtain a psychiatric examination of Bailey for possible civil commitment. Pursuant to Minnesota Statutes §§ 526.09-11 (1976), the probate court committed Bailey to the Minnesota Security Hospital as a "psychopathic personality" on July 13, 1977. While at the hospital, Bailey saw a number of psychiatrists and psychologists and was an intermittent participant in various treatment programs – most of which he dropped out of citing nonspecific "religious objections."

Approximately two years later, the Commissioner of Public Welfare, who has jurisdiction over the Security Hospital, ordered Bailey's transfer to the Department of Corrections ("DOC") to serve his prison sentence. The transfer was not effected until May 18, 1981 because of, first, Bailey's extradition to Iowa for his guilty plea and, second, Bailey's initiation of various legal challenges to the statutory authority for his transfer, concluding with Bailey's transfer in accordance with procedures prescribed by the Minnesota Supreme Court.

Bailey is currently incarcerated at the Minnesota Correctional Facility where he is serving concurrently his various sentences for sexual abuse, kidnapping, and murder. Various treatment programs are available there, though none specifically geared to sexual offenders. He remains under civil commitment as a pyschopathic personality and thus will be subject to the jurisdiction of the Commissioner of Public Welfare upon finishing his prison sentence.

To this Court, Bailey brings two separate appeals. His first appeal (No. 89-5219) is from the District Court's[1] denial of his federal habeas corpus petition under 28 U.S.C. § 2254 (1988). His other appeal (No. 89-5403) is from the District Court's grant of summary judgment for defendants on his various civil rights claims under 42 U.S.C. § 1983 (1988). This opinion covers both of these appeals, and in both we affirm the decision of the District Court.[2]

I.

We begin with Bailey's habeas corpus case. After exhausting his state remedies, Bailey brought a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, claiming that his civil commitment necessarily was discharged under Minnesota law when he was transferred from the jurisdiction of the Commissioner of Public Welfare to the DOC and, in addition, that Minnesota law does not permit the commitment of a convicted criminal as a "pychopathic personality" --which carries an indeterminate commitment period --but only as a "sex offender" – which carries a period of commitment limited to the length of the penal sentence. Bailey also contends that his dual commitment violates the Due Process Clause of the United States Constitution, and that his commitment as a psychopathic personality violates both the Due Process and Equal Protection Clauses of the Constitution. The District Court – as had the state courts before it – rejected Bailey's claims, holding that his dual commitment as well as his commitment as a pyschopathic personality were proper under Minnesota law and did not violate the Constitution. For reversal, Bailey repeats the arguments he made in the District Court. Assuming for purposes of this appeal that Bailey is "in custody" on his civil commitment within the meaning of 28 U.S.C. §

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota, presided over both cases.

[2] References to briefs, addenda, and appendices will be distinguished by a "I" (No. 89-5219) or a "II" (No. 89-5403.).

2254(a), *see Maleng v. Cook*, 490 U.S. 488, 490-94 (1989); *Peyton v. Rowe*, 391 U.S. 54 (1968), we agree with the District Court that his claims are without merit.

Minnesota state courts have interpreted the state civil commitment statutes as not requiring that a civil commitment order be discharged before transferring a committee to the custody of the DOC. *Bailey v. Gardebring*, No. C8-87-1839 (Minn. Ct. App. Mar. 8, 1988) *reprinted in* Appellee's Appendix I at A-1. Unless the underlying statutes are constitutionally defective we must defer to such an interpretation. *See Parkerson v. Carrouth*, 782 F.2d 1449, 1455 (8th Cir. 1986) ("[A]bsent an infirmity of constitutional dimensions in th[e] law, it is not for a federal court to say that a rule established by [a state]... is unwise."); *Stoianoff v. Montana*, 695 F.2d 1214, 1218 (9th Cir. 1983) ("It is, of course, solely within the province of the state courts to authoritatively construe state legislation."). Here there is no constitutional defect. The Supreme Court has determined that a state may confine people who pose a threat to themselves and other until the danger has dissipated. *See Addington v. Texas*, 441 U.S. 418, 426 (1979). Minnesota's civil commitment statutes are constitutional, and Minnesota's interpretation of these statutes allowing Bailey to be transferred to the DOC without being discharged from his civil commitment thus is immune from attack in this Court.

The same analysis applies to Bailey's claim that he was improperly committed under Minnesota's civil commitment statute, section 526.09. As the underlying statute is constitutional, we defer to the state court's interpretation to allow Bailey's commitment pursuant to section 526.09. Finally, with respect to Bailey's equal protection claim, as the District Court aptly put it, "[n]o constitutional right is violated when persons who suffer from severe disorders, such as petitioner, are treated differently from persons with less serious conditions." *Bailey v. Gardebring*, No. 4-88-637 (D.Minn. Jan. 13, 1989), *reprinted in* Appellant's Addendum I at A.2, A.12. ··We affirm the District Court's denial of Bailey's

application for writ of habeas corpus.

II.

Bailey also appeals the District Court's grant of summary judgment against him on his various civil rights claims under 42 U.S.C. § 1983 (1988). Bailey argues that as either a civil or criminal commitee he has a *constitutional right to psychiatric treatment* and that the failure of various officials at both the Security Hospital and the Correctional Facility to provide him with such treatment is a violation of his Eighth and Fourteenth Amendment rights. He also raises several arguments regarding his parole date. As there is no factual dispute and we find that the defendants are entitled to judgment as a matter of law on all of Bailey's claims, *see* Fed. R. Civ. P. 56(c), we affirm.

We turn first to Bailey's asserted right to treatment in the civil context. Bailey claims that his need for psychiatric treatment to overcome a "sexual offender condition" is analogous to a need for treatment of a bleeding ulcer or diabetes. The defendant hospital administrators argue they did not violate Bailey's constitutional right to receive psychiatric treatment.

The Supreme Court addressed the issue of a right to behavioral-modification treatment in the context of civil commitment in *Youngberg v. Romeo*, 457 U.S. 307 (1982). Romeo, the civilly committed resident in *Youngberg*, was a thirty-three-year-old man with the mental capacity of an eighteen-month-old child. He was not committed because he posed any particular danger to the community but because of his severe retardation. Romeo had sustained injuries numerous times during his commitment, some self-inflicted and some from residents reacting to his agressive behavior. To prevent Romeo from harming himself or other residents, he occasionally had been restrained with soft arm shackles. Romeo argued that training programs aimed at his self-control and interaction problems would have lessened the need for these

restraints.[3] The Court held that the Constitution required only such "minimally adequate training . . . as may be reasonable in light of [the] liberty[] in safety and freedom from unreasonable restraints." 457 U.S. at 322.[4]

Here, Bailey was committed as a pychopathic personality and was neither in danger during his civil commitment nor was he subject to any restraints beyond the ordinary incidents of any involuntary confinement. The decisions of the psychiatrists at the Security Hospital regarding his treatment were presumptively valid, *see Youngberg,* 457 U.S. at 323, and he has not made any showing to overcome this presumption of validity. In addition, the legitimacy of Bailey's commitment is not in doubt. He has manifested his dangerousness by, *inter alia,* sexually abusing, kidnapping, and murdering a thirteen-year-old girl.[5] His confinement at the Security Hospital was founded on the peril he would pose to the community, and particularly to its children, if released. In these circumstances Bailey, as a dangerous psychopath civilly committed for the purpose of safekeeping, simply does not have the constitutional right he claims. The District Court therefore was correct in its grant of summary judgment for defendants on Bailey's section 1983 claims based on the professional judgments made concerning his psychiatric treatment during his civil commitment.

[3] His treatment at the hospital once had included such training programs as well as programs teaching him feeding, showering, drying, dressing, and toilet training. *Youngberg v. Romeo,* 457 U.S. 307, 311 n.7 (1982).

[4] Even this narrow right to treatment -- explicitly tied to the avoidance of "unreasonable" restraints such as arm shackles -- was further attentuated by the extreme deference the Court held was to be accorded qualified professionals at state institutions: "[W]e emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, intereference by the federal judiciary with the internal operations of these institutions should be minimized." 457 U.S. at 322. Bailey can succeed on his claim only if he can show that the "presumptively valid" decision of the hospital psychiatrists not to provide the sort of treatment he seeks was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323. We agree with the District Court "that there is insufficient evidence for a reasonable factfinder to conclude that the DHS defendants' decisions" were a substantial departure from accepted professional practice. *Bailey v. Noot,* No. 4-85-1245 (D.Minn. June 28, 1989), *reprinted in* Appellant's Addendum II at A58, A67.

B.

Bailey also claims that the prison administrators are under a constitutional obligation to provide him with psychiatric treatment geared towards sexual offenders and that their failure to do so constitutes cruel and unusual punishment. He argues that the District Court erred in holding that defendants are entitled to summary judgment on this branch of his case. We disagree.

It is of course true that having incarcerated a prisoner, and therby having prevented him from obtaining treatment on his own, the state may be found to have inflicted cruel and unusual punishment by failing to provide needed medical treatment. Bailey's allegations, however, viewed in the light most favorable to him, do not present a factual dispute. In *Estelle v. Gamble,* 429 U.S. 97 (1976), the Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." 429 U.S. at 104 (citation omitted). The right to treatment recognized in *Estelle* has limits that Bailey's claimed right to psychiatric treatment exceeds.

That the prison administrators' failure to provide

[5] Other signs of Bailey's dangerousness include his sexually abusing his young daughter (Appellee's Appendix II at A-144), allegedly forcing homosexual activity on other residents at the Security Hospital (Appellee's Appendix II at A-74), and stating that he "[doesn't] really want th[e] treatment" for his pedophilia. (Appellee's Appendix II at A-75).

medical care must rise to the level of "deliberate indifference" presupposes the availability of a cure or at least some accepted form of treatment for the prisoner's medical needs: if there is nothing that can be done, or no accepted way of treating the condition, "deliberate indifference" is indistinguishable from steadfast vigilance. A condition for which there is no known or generally recognized method of treatment cannot serve as a predicate for the conclusion that failure to provide treatment constitutes "deliberate indifference to the serious medical needs of prisoners." *Cf. City of Canton v. Harris,* 489 U.S. 378, 397 (1989) (O'Connor, J., concurring) ("The lack of training [in the diagnosis of mental illness] is not the kind of omission that can be characterized, in and of itself, as a 'deliberate indifference' to constitutional rights."); *Eckerhart v. Hensley,* 475 F. Supp. 908, 914-15 n.16 (W.D. Mo. 1979) ("[T]he state's inability to provide a dangerous person with a reasonable opportunity to be cured or to improve his mental condition because no effective treatment is known would not render unconstitutional his involuntary confinement for the protection of himself or others.").

Here, treatment programs in the prison are available to Bailey. None of these programs, however, is specifically directed toward psychopathic individuals who have committed sexual offenses. But there is in this record no evidence of the existence of any cure or even of any generally accepted method of treatment for sexual psychopaths like Bailey. Hence, the failure of the prison administrators to provide Bailey with the precisely tailored psychiatric treatment he seeks cannot fairly be described as "deliberate indifference."

Absent a reliable medical diagnosis of some serious mental illness that can be alleviated, at least symptomatically, by some known treatment, prisoners have no consitutional right to state-provided pschiatric treatment, and we do not understand *Estelle* to hold otherwise. On this record, we are satisfied that the District Court correctly granted summary judgment for defendants on

the ground that they were not "deliberately indifferent to Bailey's serious medical needs." *Bailey v. Noot,* No. 4-85-1245 (D.Minn. June 28, 1989), *reprinted in* Appellant's Addendum II at A58, A67.

C.

Bailey's remaining claims, which the District Court also rejected, relate to his eligibility for parole. He argues that certain changes in parole review procedures effected during his incarceration violate the Ex Post Facto Clause; that the failure of the paroling authority to grant him notice and an opportunity to be heard prior to setting his release date violated his due process rights; and that the paroling authority also violated Bailey's due process rights by conditioning his parole on a finding that Bailey is "no longer a danger to the public in general and/or young females specifically." Appellant's Appendix II at 173. We find no merit in any of these claims.

1.

Bailey's contention that the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, has been violated concerns the alteration in procedures governing grants of parole at the Minnesota Correctional Facility. When Bailey was first admitted to the Correctional Facility, paroling authority was vested in the Minnesota Corrections Board ("MCB"). Soon thereafter the Minnesota legislature abolished that body and transferred paroling authority to the Commissioner of the Minnesota Department of Corrections. Both the MCB and now the Commissioner had (have) the power to "parole any person sentenced to confinement," subject only to a few limitations on this discretionary power not pertinent to our inquiry. Minn. Stat. § 243.05 subd. 1 (1990). Pursuant to this discretionary power, the Commissioner issued administrative rules governing grants of parole. These rules incorporated all the release dates that had been set by the MCB prior to its dissolution and established a new agency, the Office of Adult Release ("OAR"), to make future decisions regarding

parole. These new regulations do not provide for a yearly review of an inmate's release date, and they limit the OAR's discretion in changing an inmate's release date. Bailey claims that the failure of the new regulations to provide for an annual review of his release date -- as was required under previous system -- retroactively increases his punishment and thus contravenes the Ex Post Facto Clause.

Although this Court has not yet decided whether the federal parole guidelines are "laws" within the meaning of the Ex Post Facto clause, *see Yamamoto v. U.S. Parole Comm'n*, 794 F.2d 1295 (8th Cir. 1986), we have noted with favor the decisions of other circuits holding that the federal parole guidelines are not "laws". *Id.* at 1299. We believe the reasoning used in those cases applies to the Minnesota parole regulations. "[T]he operative factor in assessing whether a directive constitutes a 'law' for ex post facto purposes is the discretion that the [paroling authority] retains to modify that directive." *Smith v. United States Parole Comm'n,* 875 F.2d 1361, 1367 (9th Cir. 1989) "The key to the finding that [federal parole] guidelines are guides merely, and not laws, is that the Parole Commission has a congressional mandate . . . to exercise discretion. . . . How often that discretion is exercised is immaterial." *Inglese v. United States Parole Comm'n,* 768 F.2d 932, 937 (7th Cir. 1985) (citations omitted). "Applying the [ex post facto] rule to changes in parole administration . . . would discourage the formulation and publication of administrative policies." *Prater v. U.S. Parole Comm'n,* 802 F.2d 948, 953 (7th Cir. 1986) (en banc).

The Minnesota parole regulations are procedural aids to the body vested with the discretionary authority granted by the state legislature. The decision to promulgate the regulations first by the MCB and now by the Commissioner was itself a discretionary decision; neither was required by law to issue specific regulations. The "parole law" in effect at the time of Bailey's illegal acts was that the paroling authority of the state (the MCB) was free to parole any inmate, subject only to a few limitations. The

"parole law" in effect now is still that the state paroling authority (the Commissioner) is free to parole any inmate. The only changes that have been made are that the power to parole has changed hands and that the paroling authority's internal regulations governing the exercise of that power have been modified. A change in the body vested with paroling authority is not a violation of the Ex Post Facto Clause; neither is a change in the manifestation of a discretionary power that itself has remained unchanged.[6]

The majority of circuit courts agree with this conclusion. *See Resnick v. United States Parole Comm'n,* 835 F.2d 1297, 1301 (10th Cir. 1987); *Vermouth v. Corrothers,* 827 F.2d 599, 604 (9th Cir. 1987); *Sheary v. United States Parole Comm'n,* 822 F.2d 556, 558 (5th Cir. 1987); *Prater,* 802 F.2d at 953-54; *DiNapoli v. Northeast Regional Parole Comm'n,* 764 F.2d 143, 146-47 (2nd Cir.), *cert. denied,* 474 U.S. 1020 (1985); *Dufresne v. Baer,* 744 F.2d 1543, 1549-50 (11th Cir. 1984), *cert. denied,* 474 U.S. 817 (1985); *Warren v. United States Parole Comm'n,* 659 F.2d 183, 193-97 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 950 (1982); *Ruip v. United States,* 555 F.2d 1331, 1335-36 (6th Cir. 1977). *Cf. Francis v. Fox,* 838 F.2d 1147, 1150 (11th Cir. 1988) (a state work-release regulation issued pursuant to a statutory grant of discretionary power to the Corrections Department is not an ex post facto "law"). *But see Akins v. Snow,* 922 F.2d 1558, 1561 (11th Cir. 1991), *petition for cert. filed,* 59

[6] To say, as does Bailey, that before the MCB was abolished the MCB had discretionary power and that now the OAR has no discretion, is misleading. The paroling authority of Minnesota has always been required to follow the promulgated regulations -- the regulations established by the MCB allowed discretion in the paroling decision, while the current regulations allow no such discretion. At all times, the paroling authority has been obligated to adhere to the internal regulations promulgated pursuant to its discretionary authority, but at all times the paroling authority also has been free to modify its internal regulations. Indeed, the regulations issued by the Commissioner and now in effect recognize that "policy changes established by the commissioner" may affect an inmate's release date. Appellant's Addendum II at A78.

U.S.L.W. 3783 (U.S. May 9, 1991) (No. 90-1730) (a state paroling authority's regulations promulgated pursuant to a broad statutory grant of power to enact parole rules are subject to the ex post facto prohibition); *Royster v. Fauver,* 775 F.2d 527, 534 (3rd Cir. 1985) ("This circuit, alone among all others, maintains that parole regulations may be laws for purposes of ex post facto analysis."); *Rodriguez v. United States Parole Comm'n,* 594 F.2d 170, 174 (7th Cir. 1979) (holding a parole rule equivalent to a statute).

Because we hold that the Minnesota parole regulations are not "laws" for ex post facto purposes, we affirm the District Court's order granting the defendants summary judgment on Bailey's ex post facto claims.[7]

2.

Finally, Bailey argues that the District Court erred in granting summary judgment on his claims that he was denied due process by (1) defendants' failure to provide him with notice of and an opportunity to be heard at meetings of the MCB at which his release date was determined and reviewed, and (2) the MCB's conditioning its consideration of his parole on a future finding by the staff that he is no longer a danger to the public in general or to young females in particular. These claims were carefully considered and rejected by the District Court. We also carefully have considered them, find no material fact issues to preclude summary judgment, and conclude, as did the District Court, that these claims are without merit. We are satisfied that, as the court determined, Minn. Stat. § 243.05 (1976) and the Parole Decision-Making Guidelines adopted by the MCB did not give Bailey a constitutionally protected liberty interest in parole, and that in any event the process afforded him was constitutionally adequate.

[7] Contrary to the dissent's assertion, the Commissioner's incorporation of the parole release dates previously set by the MCB does not equate with "postponing" Bailey's parole eligibility. *See post* at 18 n.1. The action of the Commissioner does not extend in any way Bailey's parole eligibility; it merely affirms the MCB's earlier decision. Thus, the Commissioner has not exceeded his delegated authority, as his actions do not violate Minn. Stat. § 243.05 subd. 1(d) (1990).

To the extent that his second due process claim is one of substantitive rather than procedural due process, it is plain that a convicted criminal has no fundamental right to consideration for early release; the doctrine of substantitive due process therefore affords Bailey no basis for relief. As these claims were properly disposed of by the District Court, we affirm without further discussion.

III.

To summarize, in number 89-5219 we affirm the District Court's denial of Bailey's application for writ of habeas corpus. In number 89-5403, we affirm the District Court's grant of summary judgment for defendants on Bailey's various section 1983 claims.

Judge Stuart concurs except as to part II.C.1., as to which he concurs in the result only.

LAY, Chief Judge, dissenting.

I respectfully dissent. However, I do so only as to the majority's disposition of the ex post facto issue.

The majority does not challenge Bailey's assertion that the new parole regulations are more onerous to him, and clearly they are. Under the old regulations he was entitled to annual review of his parole date from an agency that had broad discretion to adjust that date. *See* Minn. Stat. § 243.05 (1972). Under the new regulations annual review is abolished and the OAR can review and revise release dates only to correct mathematical errors or in accordance with overall changes in policy. Minn. Rules 2940.1500 (1989).

Thus, the key issue for ex post facto analysis is whether Minn. Rules 2940.1500 constitutes a law. The majority addresses the ex post facto effect of the *federal* parole guidelines without giving proper consideration to the fact that this case involves entirely distinct *state* parole guidelines. The majority observes that a number of courts have held that the federal parole guidelines do not constitute a law for ex post facto purposes. *See, e.g., Prater v. United States Parole Comm.,* 802 F.2d 948, 953 (7th Cir. 1986) (en banc). These cases have limited relevance

because the federal guidelines are truly advisory – the parole commission may disregard the guidelines in the exercise of its own discretion. *See id.* at 954. In contrast, it is undisputed that the OAR is firmly bound by the Minnesota regulations and has no discretion to adjust release dates. *See State ex rel. Independent School Dist. No. 6 v. Johnson,* 242 Minn. 539, 548, 65 N.W.2d 668, 673 (1954). Cases cited by the majority emphasize that the existence of agency discretion to deviate from parole regulations is a key issue in determining whether the regulation constitutes a law for ex post facto purposes. *See, e.g., Smith v. United States Parole Comm.,* 875 F.2d 1361, 1367 (9th Cir. 1988). Under this analysis the Minnesota regulations must be deemed law.

The majority seeks to circumvent this conclusion by finding discretion in the agency's power to revise its parole regulations. The majority in essence argues that the Commissioner of Corrections promulgated the regulations implemented by the OAR, and because the Commissioner (and previously the Minnesota Corrections Board) always has had discretion to revise the regulations, the entire parole scheme always has been subject to the Commissioner's unbridled discretion. Under this view, Bailey never had any entitlement to any of the parole procedures in existence at the time of his offense.

This theory ignores the practical realities of Minnesota's parole scheme. The only valid test for distinguishing a law from a guideline lies in considering the discretion of the agency invested with the delegated authority to affect the rights of the prisoner. *See Smith,* 875 F.2d at 1367. In this case that agency is the OAR, not the Commissioner. The practical effect of the Commissioner's new regulations is that the agency that determines Bailey's rights has been deprived of the ability it once had to advance Bailey's release date. It makes no difference whether that agency's discretion was curtailed by legislative or administrative action. Under the majority's reasoning every legislative act would be immune from ex post facto challenge because the legislative body always has the

discretion to revise or repeal its actions. Under the majority's theory there are no true laws. Statutes passed by the legislature must then also be discretionary because the legislature may exercise its discretion to revise or repeal. This cannot be the law.

Contrary to the majority's assertions, the Minnesota regulations are not mere "procedural aids" to the OAR, nor can they be dismissed as "internal regulations." *See ante* at 11. These regulations have the force of law on the OAR, the agency charged with actually making parole decisions. Thus, Minnesota's regulations have changed the rules to the detriment of the prisoner in a most tangible and concrete manner.

The majority's assertion that "[t]he majority of circuit courts agree with this conclusion," *ante* at 12, is misleading. None of the courts in the cases cited by the majority considered or adopted the novel theory advanced here. Indeed, all but one of the cited cases considered the federal guidelines, which are truly discretionary in every sense. The remaining case addressed an Alabama parole scheme which also appears to have invested significant discretion in the agency charged with making the parole decisions. *Francis v. Fox,* 838 F.2d 1147, 1150 (11th Cir. 1988). The majority has not presented any support for its premise that administrative regulations binding on the agency charged with making parole decisions still may be deemed discretionary for ex post facto purposes.

The Seventh Circuit in *Prater* acknowledged that "[t]he rule against ex post facto laws applies to statutory changes and also (we may assume) to changes in administrative regulations that represent an exercise of delegated legislative authority, as opposed to an interpretion of legislation by an agency authorized to execute, not make, laws." 802 F.2d at 953-54. The majority concedes that the regulations at issue here are not interpretive but represent the Commissioner's exercise of delegated legislative authority. *See ante* at 11 ("The Minnesota parole regulations are procedural aids to the body vested with the discretionary authority granted by

the state legislature."). Thus, the majority goes far beyond precedent in finding that administrative exercise of even delegated legislative authority is not subject to the ex post facto clause.

The majority ignores the relevant part of our own decision in *Yamamoto v. United States Parole Comm.*, 794 F.2d 1295 (8th Cir. 1986), in which we stated:

> We recognize that some aspects of the parole process, while a matter of discretion, are such that a change in the parole process could violate the ex post facto clause . . . . Adverse changes in the frequency with which a prisoner may be *considered* for parole or in the time at which a prisoner first becomes *eligible for parole consideration* may also violate the ex post facto clause.

Id. at 1300-01 (emphasis in original); *see also Warden v. Marrero*, 417 U.S. 653, 662-63 (1974) (stating that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause . . . of whether it imposed a greater or more severe punishment than was prescribed by law at the time of the . . . offense").

The ex post facto clause would have little effect if the legislature could accomplish through administrative action what it is prohibited from doing through legislation. Thus, it is imperative that binding administrative action be considered a legislative act for purposes of the ex post facto clause. In light of the above analysis I would find that the Minnesota regulations violate the ex post facto clause,

and would order the state to provide Bailey parole review consideration pursuant to the regulations in place at time he committed his offense.[1]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[1] It also appears that enforcement of a new parole regulation that had the effect of postponing Bailey's eligibility for parole would exceed the Commissioner's statutory delegation of authority under Minn. Stat. § 243.05 subd. 2 (d) (1988). The statute provides that "any new rule or change of rule of policy adopted by the commissioner which has the effect of postponing eligibility for parole has prospective effect only." Because the new regulations effectively eliminate Bailey's eligibility for parole, the regulations must be deemed to postpone his eligibility for parole. Thus, the regulations are invalid as applied to Bailey, not only on ex post facto grounds, but on the state law ground that they exceed the Commissioner's delegated authority.

United States Court of Appeals
For The Eighth Circuit

No. 89-5219MN

Clark A. Bailey,
Appellant,
v.
Sandra Gardebring, Commissioner of Human Services, and State of Minnesota,
Appellees.

Appeal from the United States District Court for the District of Minnesota.

No. 89-5403MN

Clark Albert Bailey,
Appellant,
v.
Arthur E. Noot, Orville Pung, Charles G. Sheppard, Leslie R. Green, William F. McCrae, Bruce M. Beltt, Richard A. Alstad, James Bruton, Henry Greencrow, and Dorothy Skwiera,
Appellees.

Appellant's pro se petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Chief Judge Lay, Judge McMillian and Judge Arnold voted to grant rehearing on the ex post facto issue only. The petition for rehearing by the panel is also ordered denied.

The petition for rehearing filed by counsel for the appellant has been considered by the court and is denied.

October 11, 1991

Order Entered at the Direction of the Court.

Clerk, U.S. Court of Appeals, Eighth Circuit.

United States District Court
District of Minnesota
Fourth Division

Clark Albert Bailey,

Plaintiff,

v.

Arthur E. Noot, Orville Pung, Charles G. Sheppard, Leslie R. Green, William F. McRae, Bruce M. Beltt, Richard A. Alstad, James Bruton, Henry Greencrow, and Dorothy Skwiera,

Defendants.

Civil No. 4-85-1245

ORDER

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This matter is before the Court on plaintiff Clark Bailey's objections to two Report and Recommendations of Magistrate Floyd E. Boline dated March 23, 1988 and July 29, 1988. Bailey objects to both Report and Recommendations in their entirety. Bailey's objections raise issues under the Due Process, Cruel and Unusual Punishment, and Ex-post Facto Clauses of the United States Constitution. Applying a *de novo* standard of

review, 28 U.S.C. §636, the Court adopts the magistrate's Report and Recommendations to the extent described below.

* * *

The full Minnesota Corrections Board ("MCB") met to set a target release date for parole for Bailey on May 6, 1981. (Alstad Depo., Exh. 6). Because of the severity of Bailey's crimes, coupled with his extended history of sexual harassment of young females, the MCB removed his case from the parole guidelines matrix and set his target release date at expiration of his sentence. (Alstad Depo., Exhs. 6 and 7). The MCB informed Bailey of their decision and the reasons for it, by letter dated May 12, 1981. (Alstad Depo., Exh. 7.) The letter concluded with the statement that "[t]he [MCB] will not consider any form of release prior to the expiration of your sentence unless psychiatric, psychological, and correctional staff can certify that you are no longer a danger to the public in general and/or young females specificially." *Id.* On September 11, 1981, two members of the MCB met with Bailey to discuss the May 6, 1981 decision. (Alstad Depo., Exh. 9). The two members determined that the May 6, 1981 decision was appropriate, but corrected a designation in the May 6, 1981 remarks, presumably after being presented with contrary evidence by Bailey, which stated that the Iowa conviction was for first degree murder. The correct designation was noted to be second degree murder with a 0-40 year sentence to be served concurrent with Bailey's Minnesota sentence. *Id.*

The Minnesota legislature abolished the MCB on June 30, 1982. Minn. Laws 1981, Ch. 360, §4. The MCB conducted another review of Bailey's case prior to going out of existence. The MCB decided to keep Bailey's target release date at expiration of his sentence. Bailey was neither provided notice nor an opportunity to appear at this review.

The authority to parole previously given to the MCB was given to the commissioner of corrections in 1981. *See*

Minn. Stat. § 243.05 (1988). The commissioner was also given the authority to adopt rules governing the procedure for granting parole. *Id.* subd. 2. The commissioner adopted such rules and regulations. *See* 3 Minn. R. §§2490.0100, *et seq.* (1987). The regulations established an Office of Adult Release ("OAR"). The commissioner delegated his authority to grant parole to the OAR.

One of the rules provides that "[a]ll release dates established by the Minnesota Department of Corrections will be left in full force and effect by the commissioner." §2940.1500, subp. 2 (referred to below as §1500). Subsequent to this rule going into effect, Bailey wrote the commissioner of corrections and the executive officer of the OAR a few letters inquiring as to his eligibility for parole. (Affidavit of Clark A. Bailey, Exhs. A, B, C, and D). Both responded that pursuant to §1500, Bailey's release date can neither be extended nor reduced. (Affidavit of Clark A. Bailey, Exhs. B, C, and D). Both stated that §1500 has the force and effect of law. *Id.,* Exhs. C and D.

Bailey brought this civil rights action under 42 U.S.C. §1983 on December 20, 1982. His Second Amended Complaint alleges violations of (1) his right to treatment under the Due Process and Cruel and Unusual Punishment Clauses of the United States Constitution by the DHS defendants Sandra Gardebring, Charles Sheppard and Bruce Beltt and the DOC defendants Orville Pung (the commissioner of the DOC) and William McRae (Counts I and II); (2) his right to notice and an opportunity to be heard with respect to the MCB's decisions on parole under the Due Process Clause (Counts III and IV), and (3) his rights to not have the punishment for his crime increased under the Ex Post Facto Clause (Count V).

* * *

4. That summary judgment should be granted dismissing Count V of plaintiff's Second Amended Complaint. The Court adopts the magistrate's discussion and conclusions regarding Count V and adds the following as an additional ground for granting summary judgment

in this case.

The United States Constitution prohibits states from passing ex post fact laws. *See* Art. I, §10 cl.1. A law violates the Ex Post Facto Clause if it applies retrospectively to events occurring before its enactment and if it is more onerous than the law in effect on the date of the offense. *Miller v. Florida,* 482 U.S. 423, 430 (1987); *Yamamoto v. United States Parole Comm'n,* 794 F.2d 1295, 1297 (8th Cir. 1986). Central to the ex post facto prohibition is a concern for "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated," *Miller v. Florida,* 482 U.S. at 430 (quoting *Weaver v. Graham,* 450 U.S. 24, 30 (1981)).

The DOC defendants contend, and the magistrate concluded, that §1500 is not a law for purposes of the Ex Post Facto Clause. No case has specifically addressed this issue. Numerous cases, however, have resolved the closely related question of whether certain portions of the federal parole guidelines are laws for purposes of the Ex Post Facto Clause. *See Prater v. United States Parole Comm'n,* 802 F.2d 948, 952-954 (7th Cir. 1986) (en banc); *Inglese v. United States Parole Comm'n,* 768 F.2d 932 (7th Cir. 1985); *DiNapoli v. Northeast Reg. Parole Comm'n,* 764 F.2d 143 (2d Cir. 1985); *United States ex rel. Forman v. McCall,* 726 F.2d 1156 (3rd Cir. 1985); *Dufresne v. Baer,* 744 F.2d 1543 (11th Cir. 1984); *Rodriguez v. United States Parole Comm'n,* 594 F.2d 170 (7th Cir. 1979); *Ruip v. United States,* 555 F.2d 1331 (6th Cir. 1977). The majority of these case have held that certain portions of the federal parole guidelines are not laws for purposes of the ex post facto proscription. *Prater,* 802 F.2d at 952-954; *Inglese,* 768 F.2d at 935-36; *DiNapoli,* 764 F.2d at 146; *Dufresne,* 744 F.2d at 1549-50; *Ruip,* 555 F.2d at 1335-36. Two of these cases, however, have held that other portions of the federal parole guidelines are or may be laws for purposes of the Ex Post Facto Clause. *Rodriquez,* 594 F.2d at 173-74; *United States ex rel. Forman v. McCall,* 776 F.2d at 1163. In *Prater,* the Seventh Circuit Court of Appeals sitting *en*

banc recognized the divergence in these opinions and explained it by enunciating the following principles:

> [5, 6] The rule against ex post facto laws applies to statutory changes and also (we may assume) to changes in administrative regulations that represent *an exercise of delegated legislative authority,* as opposed to an interpretation of legislation by an agency authorized to execute, not make, laws. *See e.g., Rodriguez v. United States Parole Comm'n,* 594 F.2d 170, 173-74 (7th Cir. 1979); *United States ex rel. Graham v. United States Parole Comm'n,* 629 F.2d 1040, 1043 (5th Cir. 1980). The legislature should not be allowed to do indirectly what it is forbidden to do directly. Thus if Congress authorizes an agency to make rules governing procedure before the agency (as in section 713(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-12(a)), and the agency does so, the rules are as if made by Congress; Congress could have made them, if it had had time. But if the Justice Department issues guidelines for the enforcement of a federal statute that is administers (as it did in the 1984 Department of Justice Merger Guidelines, for example), this is the performance of an interpretive function that every law enforcement agency has; it is not the enactment of a law. *See General Electric Co. v. Gilbert,* 429 U.S. 125, 141-42, 97 S.Ct. 401, 410-11, 50 L. Ed.2d 343 (1976); 2 Davis, Administrative Law Treatise §7:8 92d ed. 1979). If the law is unchanged and no legislative regulations are promulgated, a mere change in enforcement methods, priorities, or policies, written or unwritten-a change within the scope of the executive branch's discretion in enforcing the laws passed by Congress-does not activate the prohibition against ex post facto laws.

Prater v. United States Parole Comm'n, 802 F.2d at 953-54 (emphasis added). The court then proceeded to hold that the particular portions of the federal parole guidelines at issue were intepretive regulations rather than an exercise

of delegated legislative authority, such as the regulation involved in the *Rodriguez* case, *see Rodriguez,* 594 F.2d at 171-174, where the regulations were procedural and binding. *Prater* 802 F.2d at 954. The regulations at issue in *Prater* were "merely guides, and not laws: guides may be discarded where circumstances require; laws may not." *Id.* (quoting *Inglese v. United States Parole Comm'n,* 768 F.2d 932, 936 (7th Cir. 1985)).

The Eighth Circuit Court of Appeals has declined to rule on the question of whether the federal parole guidelines are laws for purposes of Ex Post Facto Clause anaylsis. *Yamamoto,* 794 F.2d 1295, 1299 (1986). In *Yamamoto,* the Eighth Circuit noted that is was "favorably impressed" with the cases holding that the guidelines are not laws. *Id.* The Court also stated, however, that:

> [O]ur decision does not rest on the fact that the guidelines were promulgated by an agency rather than by Congress itself. Clearly, Congress may not, *by delegation,* escape constitutional limitations on its power .... For example, restrospective application of a statute or rule altering the method for computing "gain time for good conduct" to an inmate who committed a crime before the enactment of the alteration clearly violates the ex post facto clause.

Id. at 1300 (emphasis added).

While the precise contours of the case law governing what type of parole regulations will be deemed "laws" subject to the ex post facto proscription appear to be still developing, it is clear that before any regulation will be deemed such a "law", it must be a regulation promulgated pursuant to "delegated legislative authority." *Prater,* 802 F.2d at 953-54; *Yamamoto,* 794 F.2d at 1300.

The Minnesota Statute which governs the paroling authority in the instant case provides in part that:

> [t]he commissioner of corrections may adopt rules in accordance with Chapter 14, the Administrative Procedure Act, governing the procedures for granting of conditional release and final discharge. The rules

> may provide for . . . other matters necessary to implement the duties conferred by law upon the commissioner with respect to conditional release and discharge of persons.

Minnesota Statutes §243.05, subd. 2 (1988). The statute further provides:

> [t]he commissioner of corrections may parole any person sentenced to confinement in any state correctional facility for adults under the control of the commissioner of corrections, provided that:
>
> (d) any new rule or policy or change of rule or policy adopted by the commissioner of corrections which has the effect of postponing eligibility for parole has prospective effect only and applies only with respect to persons committing offenses after the effectivef date of the new rule or policy or change.

Id., subd. 1(d). Pursuant to the limitation provided in subd. 1(d), any rule adopted by the commissioner which had the effect of retrospectively postponing a prisoner's eligibility for parole would be invalid because it would be a rule which exceeded the commissioner's authority to grant or deny parole and also to make rules to carry out that authority. *See* Minn. Stat. §14.45 (1988) ("the court shall declare [a] rule invalid if it exceeds the statutory authority of the agency"). Since any such rule would be invalid as having exceeded the commissioner's authority, it could therefore not be a "law" subject to the ex post facto proscription. The Ex Post Facto Clause is directed to the legislative branch of government. Where an administrative agency exceeds its rulemaking authority in a manner which impairs the legal rights of a prisoner, the proper remedy can be obtained through an action for a determination of the validity of the rule, *see* Minn. Stat. §14.44 ("Determination of Validity of Rules"), not an action under the Ex Post Facto Clause.

Plaintiff contends that 3 Minn. R. §2940.1500, subp. 2 (1987), which provides in part that "[a]ll release dates

established by the Minnesota Department of Corrections will be left in full force and effect by the commissioner", and which was promulgated by the commissioner of corrections pursuant to the Minnesota Administrative Procedure Act, "has the 'effect' of postponing (or eliminating) Bailey's eligibility for parole . . . [and] violates §243.05, subd. 1(d)." (Plaintiff's Memorandum in Support of His Objections to Magistrate Boline's Report and Recommendation of March 23, 1988 at 16-17).

This contention proves fatal to plaintiff's claim under the Ex Post Facto Clause. If the Court adopts plaintiff's contention, which it must in order for plaintiff to prove the essential element under the Ex Post Facto Clause that the new law has a more onerous effect upon him, *see Yamamoto,* 794 F.2d at 1297, then the Court must also hold that §1500 is not a "law" for purposes of the Ex Post Facto Clause because as it applies to Bailey it exceeds the rulemaking authority granted to the commissioner by violating Minn. Stat. §243.05, subd. 1(d). If plaintiff changes his position and attempts to show that §1500 does not violate subd. 1(d), and thus perhaps may be construed as a "law" properly created pursuant to legislative authority, then he will have failed to show that §1500 creates a law which has a more onerous effect upon him. In either case, plaintiff's ex post fact claims must be dismissed.

Accordingly, based upon the foregoing, IT IS HEREBY ORDERED that summary judgment is granted in favor of defendants on Counts I-V of plaintiff's Second Amended Complaint and this case is hereby dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 27, 1989

David S. Doty, Judge
United States District Court

Minn. Stat. §14.38. Effect of adoption of rules

Subdivision 1. Original rules. Every rule, regardless of whether it might be known as a substantitive, procedural, or interpretive rule, which is filed in the office of the secretary of state as provided in sections 14.05 to 14.36 shall have the force and effect of law five working days after its notice of adoption is published in the State Register unless a different date is required by statute or a later date is specified in the rule. The secretary of state shall keep a permanent record of rules filed with that office open to public inspection.

Subd. 2. Retroactive application. Every existing rule, regardless of whether it might be known as substantitive, procedural, or interpretive rule, shall have the force and effect of law retroactive to the date on which the rule became effective if:

(a) the rule was adopted in compliance with the provisions of the administrative procedure act in effect at the time the rule was adopted;

(b) the rule was approved by the attorney general before becoming effective; and

(c) the adopting agency had statutory authority to adopt the rule.

Minn. Stat. §243.05 (1971) (repealed) Commission; powers, limitations

The state adult corrections commission may parole any person sentenced to confinement in the state prison, the state reformatory, or the Minnesota correction institute for women, ...

Minn. Stat. §243.05 (1989) Commissioner of corrections; powers, limitations

Subdivision 1. Conditional release. The commissioner of corrections may parole any person sentenced to confinement in any state correctional facility for adults under the control of the commissioner of corrections, ...

Subd. 2. Rules. The commissioner of corrections may adopt rules in accordance with chapter 14, the

Administrative Procedure Act, governing the procedures for granting of conditional release and final discharge. . . .

3 Minn. Rules §2940.1500, subp. 2

. . . Subp. 2. **Review of release dates.** Incarcerated inmates with indeterminate sentences governing their release dates which were established prior to July 1, 1982, shall be handled as follows in items A to C.

A. All release dates established by the Minnesota corrections board will be left in full force and effect by the commissioner.

B. Special reviews for the purpose of modifying release dates established by the Minnesota corrections board shall be considered by the executive officer of adult release for the following reasons:

(1) correcting mathematical, data entry, or computational erros;

(2) sentence change caused by modification in the computation of the "Minnesota Corrections Board Parole Decision-Making Guidelines"; and

(3) policy changes established by the commissioner which affect the term of imprisonment. . . .

MINNESOTA CORRECTIONS BOARD:
ADULT AND YOUTHFUL OFFENDER PAROLE POLICIES AND PROCEDURES (JULY 1977)

INTRODUCTION

It is the purpose of the following to establish the rules, regulations, and policies which will govern the operation of the Minnesota Corrections Board in discharging its responsibilities relative to the granting of parole, the revocation of parole, and such other responsibilities as defined by law.

* * *

7-101.0 Board Administrative Rules

* * *

.13 *Frequency of Hearings:* The Board shall conduct hearings every month at the State prison, the State Reformatory for Men, the Minnesota Correctional Institution for Women, and the Minnesota Metropolitan Training Center. Hearings at the St. Peter State Security Hospital will be held as required. Insofar as possible, inmates will be given at least thirty days notice of an impending hearing affecting them.

.14 *Initial Hearing:* At all adult institutions, inmates shall have an initial hearing within the first two months of incarceration.

.15 *Length of Continuance:* No continuance shall be for a period longer than twelve months. All continuances of less than one year will be set on for hearing, insofar as possible, before the same members who granted the continuance.

* * *

7-101.19 Early Review - Special Hearings

a. An inmate may apply for any early review at any time during his continuance unless at the outset of that continuance the Board has specifically indicated that an early review will not be entertained. . . .

* * *

7-104.0 Parole Decision-Making Guidelines

* * *

.2 *Determining Time to be Served Prior to Parole:*

a. Assigning a target release date:

After implementation of these guidelines, each inmate will be assigned a target release date, either at the inmate's admission hearing or at the inmate's next annual review. . . .

* * *

7-104.4 Types of Hearings Under These Guidelines

There are three types of hearings under these guidelines: initial hearing (at which the target release date is assigned), interim annual review, and re-entry hearings.

a. Intial hearings

(1) Purpose of hearing:

The purpose of the initial hearing is to ensure that the Board has complete and accurate information on each case in order to assign an appropriate target release date.

* * *

7-104.4(b) Interim Annual Reviews

Annual reviews between the initial hearing and the re-entry hearing will be non-appearance reviews. . . .

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QUESTIONS PRESENTED

1. Does a change in state parole guidelines, under which the agency retains discretion in its decision-making, and which does not increase the quantum of the prisoner's punishment, violate the ex post facto clause of the United States Constitution?

2. Does a dangerous criminal offender, who is serving a criminal sentence, and is also civilly committed as a psychopathic personality, possess a constitutional right under the due process clause of the fourteenth amendment to the United States Constitution to treatment for his psychopathic personality condition?

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STATEMENT OF THE CASE

In 1977, petitioner committed several crimes in Minnesota and Iowa including the kidnapping, rape and murder of a 13 year old girl. Petitioner pled guilty in Minnesota to criminal sexual conduct in the first degree and kidnapping, and was sentenced to concurrent 20 and 40 year prison terms. Shortly thereafter, petitioner was also committed to the Minnesota Security Hospital ("MSH") as a psychopathic personality pursuant to Minn. Stat. § 526.09 (1976). *Bailey v. Noot*, 940 F.2d 1150, 1152 (8th Cir. 1991). *See also Bailey v. Noot*, 324 N.W.2d 164, 165 (Minn. 1982).

Petitioner resided at MSH from 1977 to 1981. Petitioner was evaluated by psychiatrists and psychologists periodically throughout his stay at MSH. These officials' reports on petitioner uniformly concluded the following: (1) petitioner was not genuinely interested in reform but rather was most interested in living in a setting which provided him with freedom and comfort; (2) petitioner was extremely dangerous – a maximum security risk to both the public and patients at MSH; and (3) there was little, if any, treatment advantage to keeping petitioner at MSH. Department of Human Services 8th Cir. Appendix at A-25 to 84 ("DHS App."). During petitioner's stay at MSH, the staff periodically developed treatment plans for him and the appropriate treatment teams reviewed those plans with some frequency. In conjunction with these plans, petitioner was offered numerous opportunities to participate in treatment programs, including sex education and awareness classes, chemical dependency group programs, general group counseling sessions, education programs, and vocational training programs. Petitioner

often refused to participate in these programs. *See Bailey v. Noot*, 940 F.2d at 1152. DHS App. at A-67 to 191.[1]

In 1978, respondent Sheppard, then Medical Director at MSH, petitioned the Minnesota Department of Public Welfare (the predecessor of the Minnesota Department of Human Services) for Bailey to be transferred to the Minnesota Department of Corrections ("DOC"). Sheppard submitted the petition because of his concerns about security and because he concluded that Bailey would benefit more from treatment at MSH at the end of his criminal sentence. After lengthy legal proceedings, Bailey was ultimately transferred to DOC in 1981. *Bailey v. Noot*, 940 F.2d at 1152. DHS App. at A-32, 33.[2]

In 1981, the Minnesota Corrections Board ("MCB"), then the paroling authority in Minnesota, conducted an

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[1] Petitioner cites certain deposition testimony of respondent Sheppard in his effort to show that he did not receive treatment while at MSH. Pet. at 7. However, petitioner lifts the testimony out of context. Petitioner's counsel's questions were clearly directed at petitioner's request to participate in a particular treatment program, MSH's Intensive Treatment Program for Sexual Aggressiveness. *See, e.g.*, Bailey's 8th Cir. App. at A-146; DHS App. at A-13 to 14.

[2] Bailey erroneously states that MSH petitioned for the transfer after Bailey's appearance before the Hospital Review Board. Pet. at 7. Instead, Bailey complained to the Board shortly after Sheppard's submission of the transfer petition. DHS App. at A-32. In addition, Bailey's characterization of the Hospital Review Board's action as "hearing evidence from both sides," is somewhat misleading. Pet. at 7. The Board heard evidence from a complaining resident without the hospital staff present, and then separately asked the hospital staff to respond. DHS App. at A-32.

initial review of petitioner's case as a result of his transfer. DOC Dist. Ct. App., Alstad Dep. at 37-40; Alstad Dep. Ex. 5. Because of the extreme severity of petitioner's offense and the danger which he posed to the public, the MCB decided to remove petitioner's case from the parole release date matrix and to assign him to serve to the expiration of his sentence.[3] DOC 8th Cir. App. at A-68 to 74. Petitioner was informed that "the Minnesota Corrections Board will not consider any form of release prior to the expiration of sentence unless psychiatric, psychological and correctional staff can certify that you are no longer a danger to the public in general and/or young females specifically." DOC 8th Cir. App. at A-73 to 74. Subsequently, two members of the MCB met with Bailey to discuss his response to the MCB's decision. The reviewers agreed with the decision of the full MCB. DOC 8th Cir. App. at A-76; DOC Dist. Ct. App., Alstad Dep. at 59-60.

The Minnesota Legislature abolished the MCB in 1982 and transferred paroling authority to the Minnesota Commissioner of Corrections. Act of June 1, 1981, ch. 360, § 4, 1981 Minn. Laws 2337. Pursuant to statutory authority, the Commissioner promulgated rules concerning the parole of inmates. Minn. Rules ch. 2940 (1991). Those rules provide that decisions made regarding parole by the MCB "will be left in full force and effect by the Commissioner." Minn. Rues pt. 2940.1500, subp. 2A (1991).[4] This

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[3] For an explanation of the purpose and operation of the matrix and the target release dates, see *State ex rel. Taylor v. Schoen*, 273 N.W.2d 612 (Minn. 1978).

[4] A complete copy of Minn. Rules pt. 2940.1500, subp. 2 appears in the appendix at A-1.

rule also provides that a special review may be held to modify a release date established by the MCB if the Commissioner makes a "policy change" regarding the term of imprisonment of such individuals. Minn. Rules pt. 2940.1500, subp. 2B(3) (1991). To date, the Commissioner has left the decision by the MCB concerning petitioner, that he serve to expiration, in full force and effect.

At the time of petitioner's transfer to DOC, the MCB guidelines were not rules promulgated pursuant to the Minnesota Administrative Procedures Act ("APA").[5] The guidelines merely set forth the procedures and policies for the exercise of the MCB's wide discretion. *See State ex rel. Taylor v. Schoen*, 273 N.W.2d 612, 618 (Minn. 1978). *See also* DOC Dist. Ct. App., Green Dep. at 5.

The MCB guidelines provided for an annual review of an inmate's release date. Minn. Corr. Bd. R. 7-104.4(b) (1977).[6] This review was not a hearing for reconsideration of an inmate's parole. It consisted only of an "on paper" review by the MCB of brief materials prepared by the inmate's caseworker. The MCB merely reviewed the summary prepared by the caseworker and continued the inmate's parole release date assignment. DOC Dist. Ct. App., Green Dep. at 10. In fact, the MCB rarely changed a parole release date after the date was initially set. *Id.* at 7.

[5] The Minnesota APA specifically exempted the MCB from its rulemaking requirements. Minn. Stat. § 15.0411, subd. 2 (1980).

[6] A complete copy of Minn. Corr. Bd. R. 7-104.4(b) appears in the appendix at A-2.

The MCB made it very clear that Bailey would serve to expiration of his sentence. *Id.* at 40.[7]

In 1982, Bailey initiated this litigation pursuant to 42 U.S.C. § 1983 claiming, among other things, that (1) the DOC, in changing the parole guidelines, had violated the ex post facto clause; and (2) that the Department of Human Services ("DHS") defendants had denied Bailey treatment for his psychopathic personality commitment and thus violated the fourteenth amendment. Following cross-motions for summary judgment, the district court entered judgment for respondents. The court adopted the magistrate's report and recommendation, holding that the Minnesota parole guidelines in question were not laws for purposes of the ex post facto clause and that the challenged changes to the guidelines did not add to the quantum of appellant's punishment and thus did not violate the ex post facto clause. Bailey's 8th Cir. Brief at A-6 to 10, 68 to 74. Regarding plaintiff's fourteenth amendment claim, the court also adopted the magistrate's report and recommendation, holding that DHS defendants were qualifiedly immune from damages because the alleged right to treatment was not clearly established and that petitioner was not entitled to declaratory or injunctive relief because DHS defendants' actions had

[7] Petitioner states that he received an annual review from the MCB. Pet. at 4. However, the record indicates that the MCB only reviewed petitioner's status twice: (1) the MCB conducted an initial review as a result of Bailey's transfer from MSH in May, 1981; and (2) in September, 1981, two MCB members met with Bailey to discuss his response to the board's determination. DOC 8th Cir. App. at A-73 to 76. As noted above, the MCB was abolished effective June 30, 1982.

satisfied his claimed right to treatment. Bailey's 8th Cir. App. at A-27 to 36, 65 to 67.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed and subsequently denied Bailey's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED AS TO PETITIONER'S EX POST FACTO CLAIM BECAUSE THE OVERWHELMING WEIGHT OF AUTHORITY SUPPORTS THE MAJORITY DECISION BELOW THAT THE CHALLENGED CHANGE IN MINNESOTA'S PAROLE RULES DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

Petitioner attempts to create important unresolved issues of constitutional law and splits in the circuits in support of his petition. However, in his effort, petitioner mischaracterizes the importance of the issue presented and the current state of the law. The decision below was well founded on the relevant case law from this Court and the courts of appeal, and the petition should therefore be denied.

A. The Minnesota Rules Are Not Laws For Purposes Of The Ex Post Facto Clause.

The threshold question in ex post facto analysis is whether the challenged change constitutes a "law" for ex post facto purposes. *Weaver v. Graham*, 450 U.S. 24, 29

(1981). On this question, the majority below correctly concluded that the challenged DOC rules are not laws.

The majority below reached this conclusion by relying on the numerous cases from other circuits holding that the federal parole guidelines are not laws. *Resnick v. United States Parole Comm'n*, 835 F.2d 1297, 1301 (10th Cir. 1987); *Vermouth v. Corrothers*, 827 F.2d 599, 604 (9th Cir. 1987); *Sheary v. United States Parole Comm'n*, 822 F.2d 556, 558 (5th Cir. 1987); *Prater v. United States Parole Comm'n*, 802 F.2d 948, 953 (7th Cir. 1986) (en banc); *DiNapoli v. Northeast Regional Parole Comm'n*, 764 F.2d 143, 146-47 (2d Cir.), *cert. denied*, 474 U.S. 1020 (1985); *Dufresne v. Baer*, 744 F.2d 1543, 1549-90 (11th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985); *Warren v. United States Parole Comm'n*, 659 F.2d 183, 193-97 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Ruip v. United States*, 555 F.2d 1331, 1335-36 (6th Cir. 1977). The Eighth Circuit has favorably recognized this "impressive line of authority," *Yamamoto v. United States Parole Comm'n*, 794 F.2d 1295, 1297 (8th Cir. 1986), but it has not yet squarely addressed the issue. Only the Third Circuit Court of Appeals has equivocated as to the status of the federal guidelines, finding that the federal regulations *may* be laws for purposes of ex post facto analysis. *United States ex rel. Forman v. McCall*, 709 F.2d 852, 862 (3d Cir. 1983), *cert. denied*, 476 U.S. 1119 (1986). While this Court has not squarely addressed the status of the federal parole guidelines, it discussed approvingly several of the above-referenced cases in *Miller v. Florida*, 482 U.S. 423, 434-35 (1987). Thus, the majority relied on a well-established body of law in concluding that the federal guidelines, at least, are not laws.

Obviously, the Minnesota parole rules, not the federal regulations, are at issue in the instant matter. However, both the Minnesota and federal regulations are agency statements which indicate how the paroling agency's discretion will be exercised. Thus, the reasoning of the federal courts in determining whether the federal guidelines are laws clearly applies.

In determining whether the federal guidelines are laws, the courts have generally asked two questions, (1) does the agency retain discretion in its decision-making; and (2) are the policies underlying the ex post facto clause implicated. *See, e.g., Prater v. United States Parole Comm'n*, 802 F.2d at 952-54; *DiNapoli v. Northeast Regional Parole Comm'n*, 764 F.2d at 146-47. Applying these questions to the instant matter demonstrates that the decision below correctly concluded that the Minnesota regulations are not laws for ex post facto purposes.

First, under the statute, the Commissioner of Corrections has the same discretion as his predecessor, the MCB. The current statutory language, which confers complete discretion on the Commissioner, is virtually identical to the MCB's statutory authority. *Compare* Minn. Stat. § 243.05 (1990) *with* Minn. Stat. § 243.05 (1980).[8] The Commissioner has exercised his discretion by adopting the MCB's determination as to petitioner.

Petitioner argues that because the parole guidelines promulgated pursuant to Minn. Stat. § 243.05 (1990) confer less discretion on DOC than the statute itself, the

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[8] The relevant portion of Minn. Stat. § 243.05 (1980) appears in the appendix at A-1.

statute becomes irrelevant and the guidelines become the "laws" which should alone be reviewed. However, what is important is not the distinction between statutes and regulations, but is the decision-maker's ability to exercise discretion. In Minnesota, the decision-maker continues to have discretion relating to petitioner. The parole decision as to petitioner is not written in stone, as he would have the Court believe. The DOC rules specifically provide for special reviews and for modifications of a release date pursuant to policy changes of the Commissioner. *See* Minn. Rules pt. 2940.1500, subp. 2.

Second, the Minnesota rules do not contravene the policies underlying the ex post facto clause. Those policies are providing "fair notice . . . when the legislature increases punishment" and "restraining arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 430, 429 (1987). At the time petitioner committed his crimes, the law provided that a state agency had complete discretion regarding parole. That law has not changed. Pursuant to the law in existence at the time Bailey committed his crime, the MCB determined that petitioner should serve until expiration. The Commissioner merely adopted that decision. Furthermore, petitioner cannot possibly argue that the Minnesota regulations are "vindictive" or "arbitrary."

In sum, the decision below follows the reasoning of the great weight of authority which has analyzed the federal parole guidelines and concluded that they are not "laws" for purposes of the ex post facto clause. There exists uniformity among the courts that the key to analyzing whether such guidelines are laws is to examine the agency's discretion. The court below correctly concluded

that, in Minnesota, the decision-maker retains discretion and that the Minnesota parole guidelines therefore are not "laws." There is no reason for this Court to review that decision.

B. Even If The Minnesota Rules Are Laws, They Do Not Substantially Disadvantage Petitioner And Therefore Do Not Violate The Ex Post Facto Clause.

Two elements are required to establish that a law violates the ex post facto clause: (1) the law must apply to events occurring before its enactment; and (2) the law must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

The rules at issue in this case are admittedly retrospective as applied to petitioner. However, any disadvantage resulting to him does not rise to the level required for an ex post facto violation.[9]

Petitioner correctly states that this Court has indicated that adverse changes in a prisoner's eligibility for parole *may* violate the ex post facto clause. *Warden v. Marrero*, 417 U.S. 653, 663 (1974). The Eighth Circuit has followed this position, *Yamamoto*, 794 F.2d at 1300-01, and its decision below is not to the contrary. However, key to determining whether a particular change violates the ex post facto clause, is whether the change imposes "a

[9] Petitioner erroneously claims that the state "recognzies" that the application of the current parole guidelines disadvantages him. Pet. at 6. The DOC has never made such a statement.

greater or more severe punishment." *Marrero*, 417 U.S. at 663. In the instant matter, the district court correctly found that the challenged rules did not increase the quantum of petitioner's punishment.

Petitioner argues that the current rules work to his detriment because they somehow either repeal his parole or remove his eligibility for parole. However, he is wrong. The rules have neither effect. *See Bailey v. Noot*, 940 F.2d at 1157 n.7.[10] The MCB assigned petitioner to the expiration of his sentence. The Commissioner of Corrections affirmed that decision. Obviously, the quantum of petitioner's punishment has not changed.

Nor has the removal of the MCB's annual reviews substantially disadvantaged petitioner. The annual review was conducted pursuant to MCB policies and procedures which could have been changed at any time, without following the Minnesota Administrative Procedures Act. *See* Minn. Stat. § 15.0411, subd. 2 (1980) (exempting the MCB from the Minnesota APA). In addition, the annual review was not an occasion for the reconsideration of an inmate's previously assigned parole release date. The purpose of the annual review was simply to evaluate, on paper, the inmate's progress at the institution as it applied to the MCB's plans for that inmate's release.

[10] Although the decision below does not address this prong of ex post facto clause analysis, it does state that DOC's action did not postpone petitioner's parole eligibility. *Bailey*, 940 F.2d at 1157 n.7.

Moreover, petitioner has failed to show that he would have received a more favorable parole determination from the MCB than he has from the Commissioner, so there is no ex post facto violation. *See, e.g., Rush v. Petrovsky,* 756 F.2d 675, 676 (8th Cir. 1985) (no ex post facto claim where petitioner failed to show he would have received a more favorable parole determination). The reasons behind the MCB's decision to assign petitioner expiration of his sentence are still in existence. Nothing exists in the record to indicate that petitioner does not represent a serious threat to the public safety. As he would not have been released by the MCB, the fact that he has not been released by the Commissioner cannot be said to operate to his detriment. *See Maggard v. Wyrick,* 800 F.2d 195, 197-98 (8th Cir.), *cert. denied,* 479 U.S. 1068 (1986) (reasons are "equally compelling" under the older new release statutes, so have not operated to petitioner's disadvantage); *Burnside v. White,* 760 F.2d 217, 222-23 (8th Cir.), *cert. denied,* 474 U.S. 1022 (1985) (because the reasons for denying parole are still present, petitioner would not have been released under either the old or new statute, so the guidelines do not operate to his disadvantage).

Petitioner relies heavily on *Akins v. Snow,* 922 F.2d 1558 (11th Cir.), *cert. denied,* ___ U.S. ___, 111 S. Ct. 2915 (1991), in his effort to demonstrate a conflict in the circuits on the issue of whether a change in state parole rules violates the ex post facto clause. However, *Akins* is very different from the instant case. In *Akins,* the parole *statute,* as well as the rules in existence at the time of the plaintiff's sentence, required an annual hearing to reconsider the inmate's initial parole decision. The subsequent

changes to both the statute and rules required a reconsideration hearing only every eight years. Under the scheme, the hearing was essential for parole – no parole decision would be made without it.

The statute and rules in *Akins* permitted no agency discretion, in marked contrast to the situation presented here. In addition, as is indicated above, the instant case simply does not raise a question of reconsideration of parole or removal of parole eligibility. Thus, although the court in *Akins* found the plaintiff disadvantaged, Bailey is not. As a result, there is no conflict between the Eighth and Eleventh Circuits on this issue and no need for this Court's review.

In sum, the Court should deny the petition as to petitioner's ex post facto claim. The decision below that the Minnesota parole guidelines in question are not "laws" for purposes of the ex post facto clause is well-founded on the widely accepted standard of reviewing the decision-maker's discretion. The court below correctly found that, in Minnesota, the decision-maker retains discretion and therefore the guidelines are not "laws." In addition, contrary to petitioner's arguments, this case presents neither a significant constitutional question nor a conflict in the circuits regarding removal of eligibility for parole. The petition should therefore be denied.

II. THE COURT SHOULD DENY THE PETITION AS TO PETITIONER'S CLAIM OF A RIGHT TO TREATMENT UNDER THE FOURTEENTH AMENDMENT BECAUSE THERE IS NO SPLIT IN THE CIRCUITS AND BECAUSE OTHER GROUNDS SUPPORT THE DECISIONS OF THE COURTS BELOW.

It is true that this Court has never squarely addressed the issue of whether a dangerous civilly committed sexual psychopath also serving a prison sentence has a right to treatment under the fourteenth amendment. The Court should nonetheless deny the petition as to this issue for three reasons. First, the Eighth Circuit reasonably determined that the petitioner has no such right, and there is no split in the circuits on this issue. Second, even if such a right exists, two other grounds support the judgment below: (1) as the district court found, DHS defendants are qualifiedly immune from damages because such a right was not clearly established at the time petitioner resided at MSH; and (2) as the district court found, and the Eighth Circuit affirmed, petitioner presented insufficient evidence below to defeat summary judgment for DHS defendants.[11]

[11] Petitioner erroneously claims that the Eighth Circuit addressed only the issue of whether petitioner has a right to treatment under the Fourteenth Amendment. Pet. at 18. In fact, the court also specifically affirmed the district court's decision that DHS defendants satisfied the right to treatment standard articulated in *Youngberg v. Romeo*, 457 U.S. 307 (1982). *Bailey v. Noot*, 940 F.2d at 1154 n.4.

A. The Eighth Circuit Reasonably Determined That Petitioner Has No Fourteenth Amendment Right To Treatment, And There Is No Split In The Circuits On This Issue.

In *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975), this Court established that a civilly committed non-dangerous mentally ill person has a right to treatment under the fourteenth amendment. Petitioner's situation differs in two distinct and significant ways. First, his civil commitment was specifically based on the finding that petitioner is a dangerous sexual psychopath. Second, he is also serving a sentence based on criminal felony convictions. Based on these distinctions, this case presented a question different from that addressed in *O'Connor*, and it was reasonable for the Eighth Circuit to reach a different result. As former Chief Justice Burger noted in his concurring opinion in *O'Connor*, the commitment of a dangerous person necessarily involves the additional policy consideration of protecting the public, and this reasonably distinguishes the analysis of the rights of dangerous and non-dangerous commitees. *See O'Connor*, 422 U.S. at 582-83 (Burger, C.J., concurring). Moreover, the basis of the fourteenth amendment right to treatment is the deprivation of liberty which results from commitment. In the case of a convicted felon subject to a criminal sentence, this rationale simply does not apply – the prisoner is being deprived of his liberty because he has committed a crime, not because of his mental disability. The court below reasonably relied on both of these grounds in holding that the petitioner "does not have the constitutional right he claims." *Bailey v. Noot*, 940 F.2d at 1154.

Moreover, there exists no split in the circuits on this issue. All of the cases cited by petitioner as contradicting the decision below are readily distinguished. *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1986), recognized a statutory, not constitutional, right to treatment for the mentally ill. Two of the other cases cited by petitioner address the right to treatment of persons who have been civilly committed but have not been convicted nor sentenced for criminal conduct. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Eckerhart v. Hensely*, 475 F. Supp. 908 (W.D.Mo. 1979). Finally, *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977), addresses the right to psychiatric treatment of prisoners, not civil commitees. In short, none of these decisions concerned the issue of a right to treatment for someone who, like petitioner, is under a dual commitment – a civil commitment as a dangerous sexual psychopath and a criminal sentence for felony convictions. Even if the court were interested in this issue, it would seem prudent to allow more courts of appeal to grapple with it first.

Because the Eighth Circuit reasonably resolved the issue and there is no split in the circuits, the Court should deny the petition.

B. DHS Defendants Are Qualifiedly Immune From Damages.

Even if petitioner has a right to treatment under the fourteenth amendment, the Court should deny the petition because DHS defendants are qualifiedly immune from damages, and the district court judgment is therefore correct.

This Court has established that government officials performing discretionary functions are immune from liability for damages so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The issue turns on the "objective legal reasonableness" of the officials' actions; they are shielded from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 438 U.S. 635, 638 (1987).

During the time period in question, neither this Court, nor the Eighth Circuit nor the district court for the district of Minnesota had ever decided "whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the state." *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975). In addition, there was no analogous decision of this Court guiding DHS defendants during this period, nor did any circuit court decisions exist clearly establishing that a person in petitioner's situation was entitled to treatment. In fact, two circuit courts, looking at the period of time during which petitioner resided at MSH, have conferred qualified immunity on state officials in the DHS defendants' shoes precisely because there was no clearly established right to treatment for civilly committed dangerous persons at that time. *Smart v. Simonson*, 867 F.2d 429 (7th Cir. 1989); *Knight v. Mills*, 836 F.2d 659 (1st Cir. 1987).

Although the Eighth Circuit did not address this issue, the district court, adopting the magistrate's scholarly analysis, held that DHS defendants were qualifiedly immune from damages. There is no meritorious reason to

review that decision here, and the petition for certiorari should therefore be denied.

C. DHS Defendants Are Entitled To Judgment As A Matter Of Law.

All of the judges who have reviewed this case have found that as a matter of law, the actions of the DHS defendants satisfied any right to treatment which petitioner may have. There is no reason to reopen this analysis, and the petition should therefore be denied.

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), this Court addressed the right to treatment of civilly committed mentally retarded persons. The court recognized a limited right to treatment for such persons, and described that right as follows:

> The constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally accepted choices should have been made.

457 U.S. at 321 (quotations and citations omitted). In the instant matter, all five judges addressing this issue have found that DHS' actions satisfied the *Youngberg* standard by providing petitioner with psychiatric and psychological evaluations and numerous treatment opportunities. Although it is true that *Youngberg* addresses the right to treatment of a civilly committed person, surely the scope of petitioner's rights can be no greater than those enjoyed by the involuntarily committed mentally retarded plaintiff in *Youngberg*. The courts below correctly determined that *Youngberg* was the appropriate standard to apply, and

their conclusions are amply supported by the record. The petition for certiorari should therefore be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Minn. Stat. § 243.05 (1980)

The corrections board may parole any person sentenced to confinement . . . .

Minn. Rules pt. 2940.1500, subp. 2 (1991)

Subp. 2. Review of release dates. Incarcerated inmates with indeterminate sentences governing their release dates which were established prior to July 1, 1982, shall be handled as follows in items A to C.

A. All release dates established by the Minnesota corrections board will be left in full force and effect by the commissioner.

B. Special reviews of the purpose of modifying release dates established by the Minnesota corrections board shall be considered by the executive officer of adult release for the following reasons:

(1) correcting mathematical, data entry, or computational errors;

(2) sentence change caused by modification in the computation of the "Minnesota Corrections Board Parole Decision-Making Guidelines"; and

(3) policy changes established by the commissioner which affect the term of imprisonment.

C. The program review team shall determine if the criteria for a special review have been met. If the criteria have been met, the program review team shall forward

the information and recommendation to the executive officer of adult release. The executive officer of adult release shall make the final decision, regarding the requested adjustment in the release date.

Minn. Corr. Bd. R. 704.4(b) (1977)

Interim annual reviews

Annual reviews between the initial hearing and the re-entry hearing will be non-appearance reviews. For these annual reviews the caseworker will prepare a summary which contains information relative to:

(1) Inmate progress on MAP contract, if applicable.

(2) Inmate participation in activities, programs, treatment, education, vocational training, work assignments, etc.

(3) Any convictions (including guilty pleas or "waivers") of violations of the Inmate Disciplinary Code, and the disposition for each conviction.

(4) Any reports given the inmate for meritorious behavior.

Caseworkers will provide the copies of this summary to the Board and to the inmate ten working days before the scheduled interim review.

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No. 91-7002

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1991

CLARK ALBERT BAILEY,
Petitioner,

v.

ARTHUR E. NOOT, ORVILLE PUNG, CHARLES G. SHEPPARD, LESLIE R. GREEN, WILLIAM F. McCRAE, BRUCE M. BELTT, RICHARD A. ALSTAD, JAMES BRUTON, HENRY GREENCROW, and DOROTHY SKWIERA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This Reply Brief is submitted on behalf of Petitioner Clark Albert Bailey ("Bailey") in response to the Brief in Opposition filed by the Respondents (collectively "the State"). In its Brief in Opposition, the State contends that Bailey's petition for a writ of certiorari on his ex post facto law claim should be denied because the revised Minnesota regulations which are admittedly being applied retroactively are not laws for purposes of the ex post facto clause. Alternatively, the State argues that the new regulations do not substantially disadvantage Bailey. In making these arguments, the State ignores binding Minnesota statutory and case law, relies upon inapposite cases arising under the federal parole guidelines, and makes arguments which have been previously rejected by this Court.

With regard to Bailey's petition for a writ of certiorari on his Fourteenth Amendment claim, the State admits that this Court has never addressed the important issue raised by that claim. Instead, the State lamely suggests that this Court should allow "more courts of appeal to grapple with" the issue. (Brief in Opposition at 16.) The State further raises arguments never addressed or decided by the Eighth Circuit in the underlying decision. In any event, the arguments raised by the State are without merit. This Court should grant Bailey's Petition for a Writ of Certiorari in its entirety.

ARGUMENT

I. BAILEY'S EX POST FACTO LAW CLAIM RAISES IMPORTANT, UNRESOLVED ISSUES OF CONSTITUTIONAL LAW ON WHICH A SPLIT IN THE CIRCUITS EXISTS.

Bailey's ex post facto law claim raises important, unresolved issues of constitutional law on which a split in the circuits exists. The State attempts to argue that no important unresolved issue or split in the circuits exists by

claiming that cases holding the federal parole guidelines are not laws support the Eighth Circuit's decision in this action. Those cases have no relevance to the issues raised in this Petition, however. To the extent the reasoning of thos cases does have relevance, the reasoning applied in the federal parole guideline cases supports Bailey's Petition. In addition, the State's argument that Bailey has not been substantially disadvantaged by the retroactive application of the new Minnesota regulations is directly contrary to this Court's previous decisions.

A. The Federal Parole Guideline Cases Are Inapposite To This Petition.

The State first attempts to claim that the decision of the Eighth Circuit is supported by the numerous decisions from other circuits holding that the federal parole guidelines are not laws. Yet, as the State itself recognizes, "the Minnesota parole rules, not the federal regulations, are at issue in the instant matter." (Brief in Opposition at 8.) Unlike the federal regulations, the new Minnesota regulations, by statute and case law, have the force and effect of law and may not be disregarded by the Office of Adult Release ("OAR"). *See* Minn. Stat. § 14.38, subd. 1; *State v. Hopf,* 323 N.W.2d 746, 752 (Minn. 1982); *State ex rel. Indep. Sch. Dist. No. 6 v. Johnson,* 242 Minn. 539, 548, 65 N.W.2d 668, 673 (1954). Nowhere in its Brief in Opposition does the State address this fact.[1]

Moreover, the State misinterprets the federal parole guideline cases by suggesting those decisions held that changes in the federal guidelines did not violate the ex post facto clause *either* because the statutory discretion remained unchanged *or* because the regulations were non-bining guidelines. These factors are not independent grounds for the holdings; both are necessary. No federal

[1] Indeed, an assistant Minnesota attorney general, several of the individual respondents, and their agents have repeatedly stated that the new regulations have the force and effect of law and cannot be disregarded. (*See* Bailey's Appendix in the Eighth Circuit at 15-18, 20, 75-77, 79, 82-84, 88-89, 90-91, 111, 200-02.)

parole guideline case simply looked at the statutory discretion of the paroling authority and held that because that discretion remained unchanged, the ex post facto clause was not violated. Rather, every case, after ascertaining that the statutory authority remained unchanged, went on to examine whether the discretion left to the agency under its *own regulations* also remained unchanged. *See, e.g., Prater v. United States Parole Comm'n,* 802 F.2d 948, 953-54 (7th Cir. 1986) (*en banc*). The State's argument that because the *statutory* discretion of the parole authority remains unchanged, Bailey's ex post facto rights have not been violated simply begs the question. Bailey does not allege that the ex post facto clause was violated by an amendment to the statute. He alleges that the clause was violated when binding regulations were promulgated that eliminated the very discretion granted under the statute. The fact that discretion still exists under the statute to parole Bailey at any time does not do him any good when, under the terms of binding regulations, that discretion can no longer be exercised. Adoption of the State's argument would mean the end of the ex post facto clause, because it would permit the legislature to do indirectly what it clearly cannot do directly. *See, e.g., Yamamoto v. United States Parole Comm'n,* 794 F.2d 1295, 1300 (8th Cir. 1986); *Rodriguez v. United States Parole Comm'n,* 594 F.2d 170, 173 (7th Cir. 1979). Even though the State retains the authority to amend the regulations, the new regulations still violate the ex post facto clause. Every legislature has the power to amend its laws and every agency its regulations. The existence of that power is the *reason* for the ex post facto clause.

The State points out that the new regulations permit a change in release dates to correct mathematical errors or to reflect system-wide policy changes. But the State's discretion under the old regulations was far broader. In particular, under the old rules, the Commissioner had discretion to parole an inmate at any time based on individualized consideration of the circumstances of his

case. Inmates were reviewed annually to consider whether their release dates should be changed. The State admits that under the statute and rules in effect at the time Bailey committed his crimes, "the law provided that a state agency had complete discretion regarding parole." (Brief in Opposition at 9.) The new regulations take away the discretion. Under the current statute and new regulations, Bailey's release date of the expiration of his sentence "will be left in full force and effect by the commissioner." 3 Minn. Rules § 2940.1500, subp. 2. He is no longer eligible for parole. He has not received any annual reviews at which his release date could be changed for over ten years. Indeed, the lower courts found that "the current OAR regulations are less favorable than the former MCB [Minnesota Corrections Board] guidelines." (Magistrate's Report and Recommendation, dated March 23, 1988, at 8.)

The State also claims that the new Minnesota regulations which are being retroactively applied to Bailey do not contravene the policies underlying the ex post facto clause, because Bailey had fair notice that the statute and regulations which were in existence at the time he committed his crimes could be changed. This argument was rejected by this Court in *Miller v. Florida,* 482 U.S. 423, 431 (1987). As this Court ruled in that decision, the constitutional prohibition against ex post facto laws cannot be avoided merely by warning a person that a law, like any other law, is subject to revision. *Id.*

Thus, as set forth in Bailey's Petition, the reasoning applied by the Eighth Circuit to determine whether regulations are laws for purposes of the ex post facto clause is contrary to the reasoning adopted by other circuits and to the method for analyzing ex post facto law claims previously announced by this Court. (*See* Petition for a Writ of Certiorari at 10-16.) If the reasoning adopted by the Eighth Circuit is permitted to stand, then the ex post facto clause is effectively read out of existence. *See Bailey v. Noot,* 940 F.2d 1150, 1158-59 (8th Cir. 1991) (Lay, C.J., dissenting). Bailey's Petition should be granted to address and resolve these issues.

B. The New Minnesota Regulations Substantially Disadvantage Bailey

The State finally argues that even if the Minnesota regulations which are being retroactively applied are considered laws for purposes of the ex post facto clause, no violation exists because they do not substantially disadvantage Bailey. The State contends that because Bailey's quantum of punishment has not changed, and because Bailey cannot show that he would have received a more favorable parole determination under the old regulations as opposed to the new, no ex post facto law violation exists. (*See* Brief in Opposition at 10-12.)

This precise argument has twice been rejected by this Court. *See Miller v. Florida* 482 U.S. at 432; *Lindsey v. Washington,* 301 U.S. 397, 401-02 (1937). As this Court has stated, "one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the [punishment] he received under the new law was not more onerous than that which he might have received under the old." *Dobbert v. Florida,* 432 U.S. 282, 300 (1977). It is the elimination of discretion to parole Bailey that causes the new regulations to run afoul of the ex post facto clause. Bailey's point is that the statutory discretion can no longer be exercised because of the new regulations.

Moreover, the State's effort to distinguish the directly contrary decision of the Eleventh Circuit in *Akins v. Snow,* 922 F.2d 1558 (11th Cir.), *cert. denied,* ___ U.S. ___, 111 S.Ct. 2915 (1991), simply fails. The fact that the statute in *Akins* required an annual hearing to consider parole is no different than the undisputed fact that in this case, the regulations in effect at the time of the commission of Bailey's crimes required annual reviews at which a prisoner could be considered for parole and his release date changed.[2] Under the new regulations, the OAR has no discretion to reconsider Bailey's release date or to

[2] *See* Minnesota Corrections Bd.: Adult and Youthful Offender Parole Policies and Procedures, §§ 7-101.15-.16, 7-101.19(a), 7-104.4(b) (July 1977) (reproduced in the Appendix to Bailey's Petition for a Writ of Certiorari at A-30-31.)

provide him with parole. No further annual reviews are given to Bailey. The Eleventh Circuit's reasoning and holding is directly contrary to that of the Eighth Circuit.

As expressed in Bailey's original Petition, every other circuit court which has considered the issue has determined that a change in parole eligibility to the detriment of a prisoner violates the ex post facto law clause. This Court has similarly held that depriving an inmate of the *opportunity* to shorten his confinement violates the ex post facto clause. (*See* Petition for a Writ or Certiorari at 12-15.) This Court should grant this Petition to address these important, recurring constitutional law questions which are vital to the application of the ex post facto clause in the context of regulations affecting parole eligibility.

II. BAILEY'S RIGHT TO TREATMENT CLAIM PRESENTS AN IMPORTANT, UNRESOLVED ISSUE OF CONSTUTIONAL LAW.

The State admits that this Court has never squarely addressed the issue of whether a dangerous person civilly committed has a constitutional right to treatment under the Fourteenth Amendment. The Eighth Circuit held that no such constitutional right exists. The State lamely suggests that this Court should "allow more courts of appeal to grapple" with the issue. (Brief in Opposition at 16.)

However, this Court previously has addressed this issue in a number of similar contexts, and has always held that a constitutional right to treatment exists under the Fourteenth Amendment. In *O'Connor v. Donaldson,* 422 U.S. 563 (1975), this Court held that a civilly committed mentally ill person has a right to treatment under the Fourteenth Amendment. In *Youngberg v. Romeo,* 457 U.S. 307 (1982), this Court held that a civilly committed mentally retarded person had a constitutional right to receive treatment. In *Humphrey v. Cady,* 405 U.S. 504 (1972), this Court stated that allegations by a convicted criminal civilly committed to a state hospital facility that

he had been deprived of treatment raised substantial constitutional law claims. If all these individuals have a Fourteenth Amendment right to treatment, on what principled basis can Bailey be denied that right, especially since he was committed to receive "care, treatment, and custody"? (*See* Bailey's Appendix in the Eighth Circuit at 10, 191-92 (emphasis added).)

If a state is going to employ its inherent power to protect the public by civilly committing a person, then the *quid pro quo* for such commitment must be the obligation of the state to provide minimally adequate treatment such that the committed person has a reasonable opportunity to end the commitment. A failure to require such treatment turns the civil commitment into an indefinite or life term of imprisonment without any of the protections inherent in the criminal justice system. It would be no different than if a state indefinitely committed a person who was incompetent to stand trial, *see Jackson v. Indiana,* 406 U.S. 715 (1972), or indefinitely incarcerated an individual pending trial, or simply incarcerated a person for life regardless of the crime via civil commitment.

The Fifth Circuit, in describing its decision in *Donaldson v. O'Connor* stated:

> In *Donaldson,* we held that civilly committed mental patients have a constitutional right to such individual treatment as will help each of them to be cured or to improve his or her mental condition. We reasoned that the only permissible justifications for civil commitment, and the massive abridgements of constitutionally protected liberties it entails, were the danger posed by the individual committed to himself or to others or the individual's need for treatment and care. We held that where the justification for commitment was treatment, it offended the fundamentals of due process if treatment were not in fact provided; and we held that where the justification was the danger to self or to others, then treatment had to be provided as the *quid pro quo* society had to pay as the price of the extra safety it derived from the denial of the individual's liberty.

Wyatt v. Aderholt, 503 F.2d 1305, 1312 (5th Cir. 1974). If the state of Minnesota is going to obtain for its citizens some additional measure of safety by civilly committing Bailey in addition to convicting him of a crime, then the State must provide him with a reasonable opportunity to be relieved of that commitment. Every other circuit court which has considered the right to treatment of a civilly committed person has found that such a right exists. This Court should grant Bailey's Petition to address this important issue, and to resolve the split between the circuits created by the Eighth Circuit's decision.

Recognizing the need for this Court to grant Bailey's Petition to address this issue, the State raises two issues which were not decided by the Eighth Circuit. The State claims that it is qualifiedly immune from damages on Bailey's right to treatment claim, and that it is entitled to judgment as a matter of law. This Court should not consider fact-bound arguments which were never addressed by the Eighth Circuit.[3]

In any event, the State is not qualifiedly immune from Bailey's claims based upon analogous and similar decisions which clearly presaged or announced a Fourteenth Amendment-based right to treatment for dangerous civilly committed persons. (See cases cited at pages 18-19 of Bailey's Petition for a Writ of Certiorari.) Morever, the State remains liable to the extent Bailey has sought declaratory and injunctive relief requiring the State to provide him with treatment. *See Pulliam v. Allen,* 466 U.S. 522, 541-42 (1984); *Harlow v. Fitzgerald,* 457 U.S. 800, 819 n.34 (1982). Furthermore, this Court's decision in *Youngberg* does not mean the State is entitled to judgment as a matter of law. To the extent that decision is even applicable in this matter, Bailey's claim is not a dispute over the type of treatment to be provided. Rather, Bailey's

[3] Bailey vigorously contests these arguments and did so quite extensively in the court of appeals and district court.

claim is that he has been *denied* all treatment. No dispute between different treatment methods such as existed in *Youngberg* exists in this action.[4]

CONCLUSION

For the foregoing reasons, as well as those expressed in his Petition for a Writ of Certiorari, Petitioner Clark Albert Bailey prays that a Writ of Certiorari issue to the United States Court of Appeals for the Eighth Circuit.

Dated: February 24, 1992.

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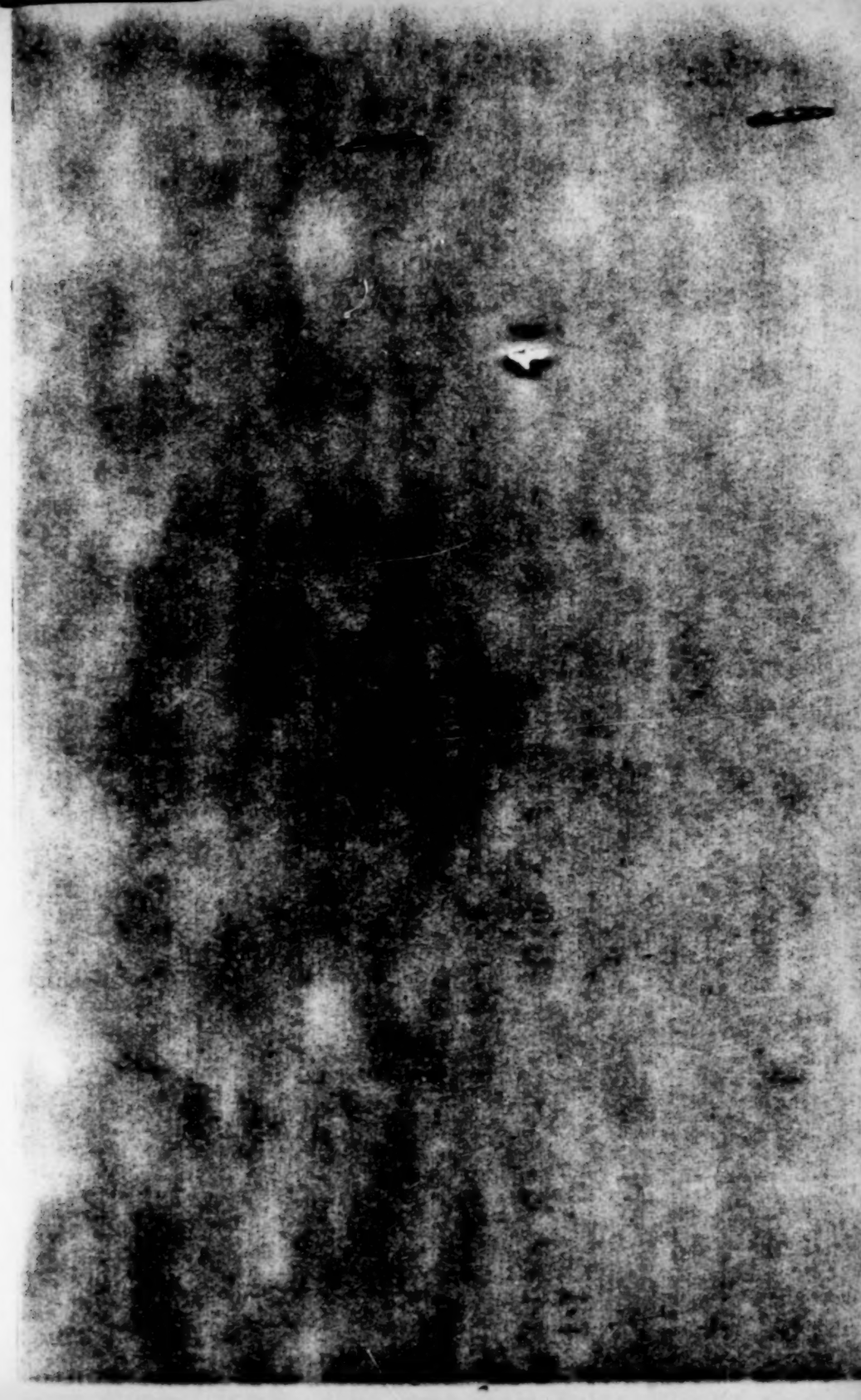
[4] The sworn testimony of Dr. Sheppard reveals that the State exercised no medical judgment in denying Bailey treatment. Instead, Bailey was simply "incarcerated" because Dr. Sheppard, in his own words, did not trust Bailey any farther than he could throw a piano and that opinion would not change while Bailey was under his care. (*See* Bailey's Appendix in the Eighth Circuit at 141, 145, 146.)



SUPREME COURT OF THE UNITED STATES

CLARK ALBERT BAILEY *v.* ARTHUR E. NOOT ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 91–7002. Decided March 23, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue in this case is whether the *ex post facto* clause of the Constitution, Art. I, §9, cl. 3, is violated when a newly-modified state parole regulation is applied to a prisoner who began serving his sentence prior to the rule change.

Petitioner pled guilty to the 1976 kidnap, sexual abuse, and murder of a young girl; he was sentenced to three concurrent jail terms, the longest of which was 40 years. In 1981, the Minnesota Corrections Board determined that, because of the severity of petitioner's crimes, the target date for his release should be the expiration of his sentence. In a letter to petitioner, the Board stated that it would "not consider any form of release prior to the expiration of your sentence unless psychiatric, psychological, and correctional staff can certify that you are no longer a danger to the public in general and/or young females specifically."

A year later, the Minnesota legislature abolished the corrections board and transferred parole responsibility to the commissioner of corrections. Minn. Stat. §243.05. The commissioner enacted new parole regulations, including a rule that "[a]ll release dates established by the Minnesota corrections board will be left in full force and effect by the commissioner." 3 Minn. R. §2940.1500, subp. 2. Petitioner

was informed that this new regulation effectively froze his release date.

Petitioner filed this civil rights action under 42 U. S. C. § 1983, asserting that application of the new parole regulation to his case violated the *ex post facto* clause. The United States District Court for the District of Minnesota entered summary judgment for respondents. A divided panel of the Court of Appeals for the Eighth Circuit affirmed, holding that "the Minnesota parole regulations are not 'laws' for ex post facto purposes . . . ." *Bailey* v. *Gardebring*, 940 F. 2d 1150, 1157 (CA8 1991). The Court, again divided, denied rehearing *en banc*.

The judgment of the Court of Appeals conflicts with decisions of other circuit courts, which have held that application of changed state parole regulations may pose *ex post facto* problems. See, *e.g.*, *Akins* v. *Snow*, 922 F. 2d 1558 (CA11), cert. denied, 111 S. Ct. 2915 (1991); *Royster* v. *Fauver*, 775 F. 2d 527 (CA3 1985). Because the issue is likely to arise frequently, I would grant certiorari to resolve the disagreement.